

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

EDWARD W. FELTEN, et al.

Plaintiffs

v.

RECORDING INDUSTRY ASSOCIATION  
OF AMERICA, INC., et al.,

Defendants

Hon. Garrett E. Brown, Jr.  
Case No. CV-01-2669 (GEB)  
Civil Action

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**PLAINTIFFS' BRIEF IN OPPOSITION  
TO DEFENDANT JOHN ASHCROFT'S MOTION TO DISMISS**

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## PRELIMINARY STATEMENT

Plaintiffs' case is straightforward: the Digital Millennium Copyright Act (DMCA) on its face and as applied to them violates First Amendment rights essential to ordinary scientific discourse. These rights, which include the rights to do research, to publish, and to learn from each other, protect society's interest in the benefits of free scientific inquiry and discourse. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (“academic freedom is of transcendent value to all of us and not just the teachers concerned”).

Plaintiffs contend that the DMCA unconstitutionally chills science in a variety of ways — in particular, by forcing scientists to obtain permission from companies whose business interests might be harmed by scientific research and publication. See, e.g., Reno v. ACLU, 521 U.S. 844, 880 (1997) (holding statute regulating indecent Internet speech unconstitutional in part because it would “confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech”); Hill v. Colorado, 530 U.S. 703, 735 n.43 (2000) (acknowledging “constitutionally problematic” nature of enactments that “allow[] a single, private actor to unilaterally silence a speaker even as to willing listeners”). Such a requirement, which effectively creates a system of censorship, is anathema to the First Amendment. See Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 69-71 (1963).

The government claims that this case is not ripe, but what the government ignores is damning to its claim: that the individual Plaintiffs did not publish a scientific paper because the private Defendants threatened to sue them and the organizers of the conference where the paper was to be presented under the DMCA; that they ultimately published a second version of that paper only with the private Defendants' express permission and only after this case was filed; that Plaintiffs, although they presented their paper at Plaintiff USENIX's conference, censored their presentation; that the Plaintiffs (and others) are currently chilled by the DMCA and face a “Hobson's choice” of pursuing their fields of scientific interest or risking potential liability.

Accordingly, this case is justiciable. Article III “injury in fact” exists because Plaintiffs have censored and continue to censor themselves because of the DMCA. Similarly, the case is ripe because the DMCA directly affects scientists like the individual plaintiffs as well as organizations that provide fora for scientific discourse, like plaintiff USENIX, who, if their interpretation of DMCA is correct, must take significant and perhaps impossible compliance measures or risk civil or criminal prosecution. See Virginia v. American Booksellers Ass’n, 484 U.S. 383, 392 (1988).

That the government has not itself threatened Plaintiffs is unimportant because it has not disavowed prosecution and because “the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.” Id. at 393. “That judges will ultimately rescue those whose conduct in retrospect is held protected is not enough, for the value of a sword of Damocles is that it hangs — not that it drops.” Rafeedie v. INS, 880 F.2d 506, 530 n.8 (D.C. Cir. 1989) (Ginsburg, J., concurring) (citation and internal quotation marks omitted). Because the DMCA can be enforced by both the government and private parties, the case for judicial review is especially appropriate here to protect First Amendment rights against unwarranted intrusion. The government’s motion to dismiss should therefore be rejected.<sup>1</sup>

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<sup>1</sup>In reviewing a motion to dismiss for lack of subject-matter jurisdiction, this Court must accept the complaint’s allegations as true, except to the extent jurisdiction depends on certain facts. The Court is not limited to the face of the pleadings. So long as the parties can contest the existence of federal jurisdiction, the district court “may inquire, by affidavits or otherwise, into the facts as they exist.” Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 410 n. 10 (3d Cir. 1992) (quoting Land v. Dollar, 330 U.S. 731, 735 n.4 (1947)). To the extent that Plaintiffs’ complaint must reflect facts as they are averred in the declarations, Plaintiffs request leave to amend to incorporate the facts as they appear in the record.

## FACTUAL BACKGROUND

This memorandum hereby incorporates by reference the Statement of Facts from Plaintiffs' Brief in Opposition to RIAA, SDMI and Verance's Motion to Dismiss ("Plaintiffs' Opposition to the Private Defendants' Motion"). The following additional facts will serve to highlight issues specific to the government's motion.

As set forth in detail in Plaintiffs' Opposition to the Private Defendants' Motion, the current dispute arose from a public challenge issued by the private Defendants, in which they sought public assistance in testing the security of copyright control measures for digital music. Felten Decl. ¶¶ 24-25.<sup>2</sup> The individual plaintiffs are scientists and researchers whose areas of academic study encompass precisely the subject matter presented in the challenge, i.e. the analysis, testing, and strengthening of techniques designed to protect and secure information. Accordingly, as part of their research, they formed a team to participate in the challenge. Felten Decl. ¶¶ 35-37. After successfully cracking a number of the technologies, the individual Plaintiffs, as they normally do for research projects such as this, wrote a paper explaining the results of their research and submitted it for publication at an academic conference. Felten Decl. ¶ 51-54.

As detailed in Plaintiffs' Opposition to the Private Defendants' Motion, the private Defendants promptly threatened to sue the individual Plaintiffs and the organizers of the

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<sup>2</sup> Plaintiffs Edward Felten, Scott Craver, Min Wu and Bede Liu previously filed Declarations in opposition to the private defendants' motion, and now file Declarations in opposition to the government's motion. The earlier ones are referred to as [Surname] Decl. the ones in opposition to the government's motion as [Surname] Supp. Decl.



conference, alleging, among other things, that publication of the academic paper would violate the DMCA, since the paper contained information about how to circumvent the technologies in the challenge. See Plaintiffs' Opposition to the Private Defendants' Motion, Exhibit C. In the face of the threat – and after extensive discussions among plaintiffs, conference organizers, university and in-house counsel – the individual Plaintiffs withdrew the paper from the conference. Felten Decl. ¶¶ 67-80. Concerned, however, that such threats would have a devastating effect on their ability to conduct future research in their chosen fields of study, the individual Plaintiffs re-submitted a slightly different version of the paper to a conference organized by Plaintiff USENIX. Felten Decl. ¶¶ 82-85. Plaintiffs then filed this lawsuit against the private Defendants and the government, seeking a declaration that they would not be liable for publishing the USENIX paper or for engaging in similar types of research and publication in the future.

After the filing of the suit and a series of negotiations, Plaintiffs eventually received assurances from the private Defendants that they would not file suit based on publication of the USENIX paper or two additional papers written by Plaintiff Min Wu regarding the results of the SDMI challenge.<sup>3</sup> However, the private Defendants refused to provide similar assurances for: (1) any versions of the papers that involved more than trivial changes; (2) any future papers based on research arising from the SDMI challenge; (3) any of the specific projects that the individual Plaintiffs were already, or were about to be, engaged in involving the types of technologies represented in the challenge. Plaintiffs also sought assurances from the government that they

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<sup>3</sup> (1) "Analysis of Attacks on SDMI Audio Watermarks," which was included in an IEEE conference after it was too late to withdraw it, Liu Decl. ¶ 20; and (2) Prof. Wu's dissertation, "Multimedia Data Hiding," Chapter 10 of which was originally posted on the Internet, but then withdrawn because of concerns about DMCA liability. Wu Decl. ¶¶ 2-3.

would not prosecute based upon the papers or on subsequent papers. The government refused to provide any assurances whatsoever.

The lack of assurances, combined with the past threats from the private Defendants and the government's demonstrated willingness to enforce the criminal provisions of the DMCA,<sup>4</sup> has had a substantial current and ongoing impact on plaintiffs' activities. In particular, Plaintiffs have already engaged, or will soon engage absent relief from this court, in acts of self-censorship out of concern of civil or criminal DMCA liability. Specifically:

Plaintiff Scott Craver, when he presented the SDMI paper at the USENIX conference, did not make available the computer programs used by the plaintiffs to attack the technologies, as he normally would have absent the DMCA. Craver Supp. Decl. ¶ 12. In addition, as part of his Ph.D. research, he has developed a better way to detect and characterize certain types of modifications to digital music and is currently developing a software program that can more efficiently perform forensic analysis of digital music. He is concerned that his distribution of information about his technique and the program itself will open him up to DMCA liability. Craver Supp. Decl. ¶¶ 26, 29. Amended Complaint, ¶¶ 56-60. Craver makes clear in his Supplemental Declaration (¶¶ 19-22) that the DMCA not only has affected his own work, but likely will eviscerate the entire scientific discipline of information hiding in which he works.

Plaintiffs Min Wu and Bede Liu have signed a contract with Springer-Verlag to publish in book form a revised version of Prof. Wu's dissertation, Chapter 10 of which includes results from the SDMI paper. As with any such publication, the dissertation must be revised and

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<sup>4</sup> As noted in the government's brief, the government has brought a criminal indictment against a company and a programmer for the distribution of a computer program that circumvents an access control technology. Gov. Br., Att. E, F.

expanded upon before publication, and the delivery date of the manuscript is February 15, 2002, if they go ahead with it. However, unless there is a resolution of the DMCA issues, Prof. Wu will be unable to submit a revised version of that chapter. Wu Supp. Decl. ¶ 3; Liu Supp. Decl. ¶ 3; Amended Complaint, ¶¶ 61-67. Prof. Wu also has specific plans to continue research on digital multimedia security, analysis, and communication, and is concerned that these projects will also trigger DMCA liability. Amended Complaint, ¶¶ 68-69.

Plaintiff Daniel Wallach has declined an invitation to submit an article he had intended to write on the history of copyright protection technologies, out of concern about DMCA liability. Wallach Decl. ¶ 24. “[T]his paper would require a great deal of work. . . . Given the threats made against us and the potential reach of the DMCA, I will not write this paper unless the legal issues surrounding the DMCA are resolved favorably. I cannot afford to devote time to a paper that I may not be able to publish and I surely do not want to run the risk of yet another threat of a lawsuit.” Id.

Plaintiff Bede Liu is currently engaged in research on ways to attack watermarking technology. Prof. Liu’s current research is supported by one current grant and two pending grants. This research is directly implicated by the DMCA. Liu Decl. ¶ 15; Amended Complaint, ¶ 73. Prof. Liu would like to continue research on the SDMI technologies with Prof. Wu, Scott Craver and other students, but is not sure whether they can proceed in face of the DMCA and the private Defendants’ previous threats. See Liu Decl. ¶ 26. He is also unsure about how much of the material from the SDMI challenge he can discuss with colleagues, which currently presents a problem for him as he is visiting universities and giving presentations in Paris, France. See Liu Supp. Decl. ¶ 4. Rather than risk potential liability, he will censor his speech. Id.

Plaintiff USENIX will sponsor 8-10 conferences in the upcoming year, at least six of which, like the USENIX conference at which the SDMI paper was presented, will involve the presentation of papers involving encryption and information security. USENIX derives revenue from these conferences. Thus, it is certain that USENIX's future activity will implicate the DMCA. Amended Complaint, ¶¶ 76-79.

Plaintiff Edward Felten has been appointed publications chair of a conference on Security and Privacy in Digital Rights Management, which will be held in November 2001. The conference will publish papers analyzing technologies that are designed to protect access to copyrighted materials. Amended Complaint, ¶¶ 80-84. He has also been invited by Scientific American to write an article describing the nature of information hiding technology, which he will decline unless he receives assurances from the defendants or this court that he will not be violating the DMCA. Felten Supp. Decl. ¶¶ 3-9.

## ARGUMENT

### Plaintiffs' Claims Are Ripe

The government argues that Plaintiffs' challenge neither affords them standing to sue nor is sufficiently ripe. Standing and ripeness analyses are often intertwined because both consider the existence of an actual injury. See Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1462 (3d Cir. 1994); Erwin Chemerinsky, FEDERAL JURISDICTION 115 (3d ed. 1999). An injury that is too "abstract" or "hypothetical" because it likely may never occur may be seen as failing to meet the injury in fact requirement of standing or as "too remote" to satisfy ripeness. See id. The two doctrines are nonetheless distinct. While standing focuses on the proper party to bring suit, "ripeness is peculiarly a question of timing," Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974), and "properly should be

understood as involving the question of when may a party seek preenforcement review of a statute or regulation.” FEDERAL JURISDICTION at 116 (emphasis in original) (quoted in Presbytery of New Jersey, 40 F.3d at 1463).

Ripeness contains elements of both Article III’s case or controversy requirement and prudential limitations. See Reno v. Catholic Social Services, Inc., 509 U.S. 43, 57 n. 18 (1993). Although partially grounded in Article III, Philadelphia Federation of Teachers v. Ridge, 150 F.3d 319, 323 n.3 (3d Cir. 1998), ripeness is a flexible doctrine that should not be applied mechanically, Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir.1990). Application of the ripeness doctrine is often context-specific, depending on the underlying claims asserted by the plaintiff. See id.; see also Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979, 987 (3d Cir. 1986).

In First Amendment contexts, ripeness analysis is relaxed out of concern for possible chilling effects on free expression. Id.; New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995); Planned Parenthood Ass’n of Chicago Area v. Kempiners, 700 F.2d 1115, 1122 (7th Cir. 1983) (“Requirements of ripeness are less strictly construed in the first amendment context due to the chilling effect on protected expression which delay might produce”) (separate opinion by Cudahy, J.); 13A Charles Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3532.3 at 159 (2d ed. 1983) (“First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.”).

The Third Circuit generally applies the three-part test of Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 647 (3d Cir. 1990), to assess ripeness in pre-enforcement challenges. See Philadelphia Federation of Teachers, 150 F.3d at 323 n.4. Under Step-Saver, the plaintiff must show that (1) the parties have adverse legal interests, (2) the court can render a judgment that conclusively alters the parties’ legal relationship, and (3) the judgment would have some

practical effect or utility. Presbytery of New Jersey, 40 F.3d at 1463. Plaintiffs easily satisfy each factor.

A. The Parties' Interests Are Adverse Because the DMCA Arguably Reaches the Speech of Plaintiffs and Other Scientists and the Government Has Not Disavowed Prosecution

The first Step-Saver factor requires that the defendant "be so situated that the parties have adverse legal interests." Step-Saver, 912 F.2d at 648 (quoting Wright & Miller, § 2757, at 582-83 (2d. ed. 1983)). In this case, the Plaintiffs' legal interests are adverse to the interests of the government because the DMCA threatens Plaintiffs' First Amendment rights, and the government has not disavowed enforcement of the statute. See Presbytery of New Jersey, 40 F.3d at 1458 (declaratory action claiming that law forbidding discrimination on basis of sexual orientation violated pastor's First Amendment rights was ripe where he alleged intent to engage in protected conduct and the state refused to waive prosecution).

The government contends that no adversity of interests exists because it has neither prosecuted Plaintiffs nor threatened them with prosecution. But "it is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." Steffel v. Thompson, 415 U.S. 452, 459 (1974). Such a rule would force a person either to forgo protected activity or risk liability. Presbytery of New Jersey, 40 F.3d at 1468; Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 148 (3d Cir. 2000).

Nor, contrary to the government's assertion, is actual threat of prosecution required. Courts frequently permit preenforcement challenges to allegedly unconstitutional laws, even where the government has made no threat or taken any action against the plaintiffs. See, e.g., Reno v. ACLU, 521 U.S. at 861 (preenforcement challenge filed day law was signed by President); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 301-02 (1979) (sufficient adversity despite lack of government threat or history of enforcement); Presbytery of New

Jersey, 40 F.3d at 1463 (challenge ripe despite lack of any threat or other indication that government would enforce statute); Planned Parenthood, 220 F.3d at 131 (preenforcement challenge found ripe although filed on day law was to go into effect); ACLU v. Reno, 31 F.Supp.2d 473, 477 (E.D. Pa. 1999) (preenforcement challenge filed before law went into effect), aff'd, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom. Ashcroft v. ACLU, 121 S. Ct. 1997 (2001); ACLU v. Johnson, 194 F.3d 1149, 1154-55 (10th Cir. 1999) (same).

To establish adversity, Plaintiffs need only show that they face a “credible threat of prosecution.”<sup>5</sup> See Reno, 31 F.Supp.2d at 479-81 (preenforcement challenge to Internet “harmful to minors” statute ripe because plaintiffs offered sexual content that could be prohibited on “not unreasonable” interpretation of the statute and thus plaintiffs could potentially face prosecution); aff'd, Reno, 217 F.3d at 171 (approving justiciability analysis).

“This standard— encapsulated in the phrase—‘credible threat of prosecution’—is quite forgiving.” Reno, 31 F.Supp.2d at 479-80 (quoting New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 14 (1<sup>st</sup> Cir. 1996); see Babbitt, 442 U.S. at 302 (permitting First Amendment challenge where fear of prosecution not “imaginary or wholly speculative”). Under this standard, courts will presume that a credible threat exists if the statute, on its face, arguably restricts rights of free expression. “[W]hen dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.” Reno, 31 F.Supp.2d at 480 (quoting New Hampshire Right to Life, 99 F.3d at 15 (emphasis added)). This presumption reflects the judicial recognition that even in the absence of express government action, a reasonable fear of possible

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<sup>5</sup> The phrase “credible threat of prosecution” is somewhat misleading because a “credible threat” can exist without any specific threat having been made. The phrase is probably best understood to refer to the possibility of prosecution, not the veracity of a threat to prosecute.

prosecution may significantly chill constitutionally protected behavior. See New Hampshire Right to Life, 99 F.3d at 13.<sup>6</sup>

Plaintiffs have established a credible threat of prosecution under the DMCA. Both their past conduct and their intended, future conduct are facially restricted by the DMCA. As set forth in extensive detail in the record, Plaintiffs filed this action after the private Defendants threatened to sue under the DMCA to stop publication of a paper at a scientific conference. Thus, they have faced actual threats of suit from private parties based on the DMCA. Furthermore, they are in the process of taking similar actions now and fully intend to continue their work, including further research and publications on the very SDMI technologies at issue in this case, because these activities are essential to what they do as scientists (see section B, infra). They could not avoid these activities and remain in their chosen fields of research.

The government argues that Plaintiffs do not face a credible threat of prosecution because their activities fall outside the DMCA's prohibitions. Gov. Br. at 17 (the DMCA does not reach Plaintiffs' activities because "Plaintiffs' purpose is not to circumvent any access control measures, but rather to study, and to assist others in bolstering, those access controls.") Although the government acknowledges that the DMCA could cover publications "that describe in detail how to go about circumventing a particular technology," it reads the DMCA to exclude Plaintiffs' papers and computer programs<sup>7</sup> because "the Plaintiffs are scientists attempting to

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<sup>6</sup> The credible threat standard for First Amendment cases does not require that the law "single out" the plaintiffs, as suggested by the government's reliance on Navegar v. United States, 103 F.3d 994 (D.C. Cir. 1997). The statute in Navegar did not potentially threaten First Amendment rights, while the DMCA facially restricts expressive activity by the class to which Plaintiffs belong: those who research and publish in the areas of computer and information security. Moreover, given that DMCA-based threats may come from private parties as well as the government, and that the private Defendants' threat actually injured the individual Plaintiffs, there is nothing premature about this action.

<sup>7</sup> See discussion of Scott Craver's allegations, Gov. Br. at 17.



study access control technologies.” *Id.* at 17 n.5. In effect, the government (at least for the purpose of this litigation) reads a “legitimate scientific purpose” exception into the DMCA.<sup>8</sup>

For present purposes, however, the point is that the DMCA can reasonably be read to reach scientific speech. The DMCA makes it unlawful for any person to “manufacture, import, offer to 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 a technological measure that effectively controls access to a work protected under this title . . . [or] has only limited commercially significant purpose or use other than to circumvent [such measure] . . . or is marketed by that person or another [to circumvent such measures].”<sup>9</sup> § 1201(a)(2). Circumventing technological measures, as defined in § 1201(a)(3)(A),<sup>10</sup> is precisely what Plaintiffs do in the normal course of their work. They attack

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<sup>8</sup> If adopted by this Court, the government’s interpretation could alleviate a good deal of the DMCA’s current chilling effects. Sections 1201(a)(2) and 1201(b)(1) could be read to exclude the publications of scientific papers and computer programs by reading a “scientific purpose” exemption into each of the disjunctive factors listed in those sections:

- (A) is primarily designed or produced for the purposes of circumventing . . .
- (B) has only limited commercially significant purpose or use other than to circumvent . . .
- (C) is marketed . . . for use in circumventing . . .

The government’s interpretation has some support in the legislative history. See Report of the House Comm. on Commerce, H.R. Rep. No. 105-551, at 11 (1998) (§1201(a)(2) aimed at “black boxes” expressly intended to facilitate “circumvention”). However, the relevant point is that no such interpretation exists in any reported opinion that would insulate Plaintiffs in this case, and as Plaintiffs have argued, the statute itself is so vague that many other readings are equally possible. Thus, as things currently stand, Plaintiffs face a very real and credible possibility of liability under the statute.

<sup>9</sup> The statute has parallel provisions in §1201(b)(1), which proscribes the distribution of technologies primarily designed to circumvent measures that protect the rights of copyright owners (as opposed to protecting access). The same analysis applies to those provisions.

<sup>10</sup> Section 1201(a)(3)(A) reads “to ‘circumvent a technological measure’ [in § 1201(a)] means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” The corresponding provision in § 1201(b)(2) defines the circumvention of

(i.e., “circumvent”) protections on computer and information systems to both test the strengths of those systems and develop stronger, more secure systems.<sup>11</sup> And as scientists, they normally publish their results.<sup>12</sup> Besides programs like Scott Craver’s “tinywarp.c,” which actually circumvent, scientific and academic papers can be thought of as “primarily designed” for the purpose of circumvention because, as noted by the government, papers may contain sufficient detail to show how to circumvent technological controls. In fact, that is what scientific articles are meant to do.

A central tenet of the scientific method is replicability of results; scientific publication is intended to enable others to try experiments and verify the conclusions. Thus, a scientist publishing an article that explains the vulnerabilities of a technological protection measure in effect says to his or her colleagues, “this is how I attacked (i.e., circumvented) this technology; try it yourself.” See Craver Supp. Decl. ¶¶ 5, 10; see also Lazowska Decl. ¶ 8. And much theoretical research that can give useful information on how to attack systems may have limited, or no, commercially significant purpose or use other than to circumvent technological measures. See Lazowska Decl. ¶ 23; cf. Dwork Decl. ¶¶ 11-14 (examples of theoretical research). Thus, the prohibition in § 1201(a)(2) (and 1201(b)(1)) can be read—as the private Defendants have—to cover the publication of scientific papers and computer programs that are “primarily designed or

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“protection afforded by a technological measure . . . [as] avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure.” § 1201(b)(2)(A).

<sup>11</sup> See Felten Decl. ¶¶ 96-99; Craver Decl. ¶¶ 9-11; Craver Supp. Decl. ¶¶ 4-5, 22; Liu Decl. ¶ 9; Wu Decl. ¶ 7; Dean Decl. ¶ 22; Appel Decl. ¶¶ 3-6; Blaze Decl. ¶¶ 2, 9-11; Lazowska Decl. ¶¶ 4-6; Schneier ¶¶ 9-10; Spafford Decl. ¶ 21; Anderson Decl. ¶ 14.

<sup>12</sup> See Craver Decl. ¶ 29; Blaze Decl. ¶¶ 13, 15-18; Schneier Decl. ¶¶ 13-15; Wagner Decl. ¶¶ 18-22. See generally Lazowska Decl. ¶¶ 7-18.

produced” to attack the security of systems or “have limited commercially significant purpose or use” other than to attack systems.<sup>13</sup>

The government’s argument that the DMCA cannot be read to cover scientific and academic speech is, therefore, simply wrong. The DMCA, on its face, can be reasonably read to reach Plaintiff’s speech, and as recognized by the court in Reno, 31 F.Supp.2d at 480-81, a saving construction of an arguably vague or ambiguous statute offered in litigation cannot defeat jurisdiction. In Reno, the government contested the plaintiffs’ standing on the ground that the Child Online Protection Act (COPA) did not reach the plaintiffs’ speech “because the material on their Web site is not ‘harmful to minors,’ and the plaintiffs are not ‘engaged in the business’ of distributing harmful to minors materials under the statute.” 31 F.Supp.2d at 480. The court rejected this argument because the statute could arguably be read to reach their conduct. See id. at 480-81. “The plaintiffs offer an interpretation of the statute which is not unreasonable, and if their interpretation of COPA’s definition of ‘harmful to minors’ is correct, they could potentially face prosecution for that content on their Web sites.” Id. at 481; accord New Mexicans for Richardson, 64 F.3d at 1502 (rejecting state’s construction of vague election finance statute to exclude plaintiffs’ activities in finding case ripe).<sup>14</sup>

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<sup>13</sup> None of the § 1201 exemptions expressly provides a safe harbor for the dissemination or general publication of papers or computer programs for legitimate scientific purposes. The encryption and security testing exemptions in § 1201(g) and § 1201(j), respectively, provide limited exemptions for certain acts of circumvention (i.e., acts covered under § 1201(a)(1)), and even more limited exemptions for acts of dissemination covered under § 1201(a)(2), but neither exempts general publication in, for example, scientific journals or on a scientist’s website that would otherwise violate § 1201(a)(2). Moreover, neither exemption applies to acts of dissemination covered under § 1201(b)(1). The reverse engineering exemption in § 1201(f) is also of no help since it only applies for the purpose of enabling interoperability. See § 1201(f)(2).

<sup>14</sup> Followed to its logical conclusion, the government’s argument that a plaintiff faces no credible threat of prosecution if a vague law could be construed to exclude the plaintiff’s conduct would prevent all preenforcement challenges to laws that are susceptible to more than one reasonable interpretation.

Equally important, the government's reading is at odds with the interpretation shared by the private Defendants. In threatening to sue Prof. Felten and his colleagues, the private Defendants plainly read the DMCA to cover scientific publication — a reading that counsels for Princeton and Rice universities took very seriously. See Ende Decl. ¶ 6; Zansitis Decl. ¶ 6; see also Wagner Decl. ¶¶ 63-64 (researcher advised by UC-Berkeley legal counsel that publication of academic paper relating to copy-protection systems might subject authors to civil liability).

Accordingly, the DMCA's susceptibility to different interpretations and the Defendants' widely divergent interpretations of the DMCA support the conclusion that this case is ripe. New Mexicans for Richardson, 64 F.3d at 1503 (“It is generally accepted that the arguable vagueness [or overbreadth] of a statute militates in favor of finding an otherwise premature controversy to be ripe”). The reason is obvious: vague or overbroad laws may chill protected expression, see Baggett v. Bullitt, 377 U.S. 360, 372 (1964), and can lead to self-censorship, a danger that “can be realized without an actual prosecution.” American Booksellers, 484 U.S. at 393. Thus, “the extent of the chill upon First Amendment rights indicated by vague or overbroad statutes is the most significant factor in determining whether an otherwise premature or abstract facial attack . . . is ripe for decision.” New Mexicans for Richardson, 64 F.3d at 1503 (internal quotation marks and citation omitted).

Application of the DMCA to the Plaintiffs' speech and the reach of the statute have already chilled Plaintiffs' speech. The government argues, of course, that the Plaintiffs were not chilled because they eventually presented and published the SDMI paper at the August 2000 USENIX conference and because Prof. Wu published her dissertation on her website. Prof. Wu's dissertation may be publicly available at Princeton University library, but her choice was to have her entire dissertation available on her website, and she was chilled by the private Defendants' threats into removing Chapter 10. See Wu Decl. ¶ 3. The government forgets that the publication of the SDMI paper at the USENIX conference occurred only because the private Defendants expressly authorized Plaintiffs' publication, and that Plaintiffs' presentation occurred nearly four

months after they were prepared to present a paper at the Information Hiding Workshop conference in April. Delay in the exercise of First Amendment rights is itself an example of chill and sufficient to constitute an irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion).

The Plaintiffs continue to suffer concrete current and ongoing harm. (See Factual Background, supra.) Prof. Felten will decline an invitation from Scientific American to write an article describing the role, nature, and applications of information hiding technologies, including the SDMI technologies, “unless the attendant risk of a DMCA suit or prosecution against me is removed, either by a ruling of this Court or by suitable assurances from the Defendants.” Felten Decl. ¶ 139. Prof. Wu and Prof. Liu have signed a contract with Springer-Verlag to publish a revised version of Prof. Wu’s dissertation; February 15, 2002, is the delivery date of the manuscript, and if they go forward with the book, they want to submit a manuscript that contains changes to Chapter 10, but will not unless there is some favorable resolution of potential DMCA problems. Wu Supp. Decl. ¶ 3; Liu Supp. Decl. ¶ 3. Prof. Liu is currently in Paris giving academic talks. Liu Supp. Decl. ¶ 4. He would like to talk about the SDMI challenge, but because of his exposure to liability under the DMCA, he will limit his presentations and answers to any questions to material in the papers filed under seal. Id.

Prof. Wallach refused to write an article on the history of copyright protection measures for publication. Wallach Decl. ¶ 24. Although Mr. Craver presented the SDMI paper at the August 15 USENIX conference on behalf of all of the authors, he did not publish the programs they used to attack the SDMI technologies on the Web or give out the Web address during his presentation — normal practice among researchers and what Mr. Craver would have done but for the DMCA. Craver Supp Decl. ¶¶ 9-10. Mr. Craver’s dissertation project is progressing slowly because of the DMCA. See id. ¶¶ 27-19. In fact, the design he settled on for the program for his dissertation project was “motivated solely by the DMCA.” Id. ¶ 26.

Given the wide variety of activities the Plaintiffs are currently engaged in and the reach of the DMCA, the clear presumption is that Plaintiffs face a credible threat of prosecution. And there is no “compelling evidence to the contrary.” Notwithstanding its proffered interpretation, the government has not disavowed any intention to enforce the DMCA. The failure to disavow prosecution by itself is an important indicator, and sometimes conclusive, of a credible threat of prosecution. See Babbitt, 442 U.S. at 302 (finding relevant government’s failure to disavow enforcement); Presbytery of New Jersey, 40 F.3d at 1463 (failure of state to disavow intent to prosecute sufficient to create adversity between the parties); Pic-A-State v. Reno, 76 F.3d 1294, 1299 (3d Cir. 1996); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155 (9th Cir. 2000).

**B. The Record Contains More Than Sufficient Facts for this Court To Grant Conclusive Relief**

The second Step-Saver factor asks whether the court can grant conclusive relief to alter the legal relationship between the parties, Armstrong World Industries, Inc. v. Adams, 961 F.2d 405, 421 (3d Cir. 1992), or whether a decision at the present time would be no “more than an advisory opinion based upon a hypothetical set of facts.” Presbytery of New Jersey, 40 F.3d at 1468. Part of the conclusiveness inquiry, therefore, asks whether further factual development is necessary for the court to render a decision. Travelers Insurance Co. v. Obusek, 72 F.3d 1148, 1155 (3d Cir. 1995).

The importance of factual specificity varies according to the issues presented by the claims. See id.; see also Presbytery of New Jersey, 40 F.3d at 1468. “When the question presented [by a particular claim] is ‘predominantly legal,’ a factual record is not as important as in fact-sensitive areas.” Pic-A-State, 76 F.3d at 1300. In this action, Plaintiffs raise three major claims against the Defendants: that DMCA violates the First Amendment on its face; that, as applied, DMCA violates Plaintiffs’ First Amendment rights; and that Congress exceeded its

constitutional powers in enacting the DMCA.<sup>15</sup> None of these requires significant further factual development. Thus, there is no benefit to delaying resolution of the underlying issues, especially when failure to resolve these issues generates self-censorship.

Relief can now be granted on Plaintiffs' First Amendment facial challenge. Am. Compl. ¶¶ 95- 102. This claim, by definition, is predominantly legal because it is not dependent on application of the law to a specific set of facts. See Pic-A-State, 76 F.3d at 1300; see also Presbytery of New Jersey, 40 F.3d at 1468-69. First Amendment facial challenges are especially important because they implicate the rights of third parties as well as of Plaintiffs. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 129-30 (1992). Thus, courts have allowed such facial challenges before the law has gone into effect and, thus *a fortiori*, in the absence of any concrete factual setting. See, e.g., Reno, 31 F.Supp.2d at 481; Presbytery of New Jersey, 40 F.3d at 1469 (“To the extent . . . that the court concluded that a facial challenge to a statute that seeks to proscribe otherwise protected First Amendment conduct such as oral advocacy and boycott is not ripe until a concrete factual situation is before the court, . . . we disagree”) (citation omitted) (rejecting Voluntary Ass’n of Religious Leaders v. Waihee, 800 F.Supp. 882 (D. Haw. 1992)).

To the extent that a concrete factual setting can help resolve a facial challenge, it is present here. The potential reach and application of the DMCA to scientific speech is fully illustrated by the private Defendants' threats against the Plaintiffs in April 2001. Moreover, (1) the likely publication of Prof. Wu and Prof. Liu's book, (2) Scott Craver's program that is part of his dissertation project and the program he wrote that defeated SDMI Technology F, (3) Prof. Liu's intended research on SDMI technologies, (4) Prof. Wallach's invitation to write an article for the IEEE; and (5) Prof. Felten's invitation to write an article for Scientific American present additional, concrete settings that illuminate Plaintiffs' facial challenge.

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<sup>15</sup> Plaintiffs also claim that the “click-through” license to which they agreed at the outset of the private Defendants' “SDMI Public Challenge” does not bar their academic publication.

Additionally, the record provides more than sufficient factual detail to support Plaintiffs' claim that ongoing projects and future publications related to the SDMI Challenge either fall outside the scope of the DMCA, Am. Compl. ¶¶ 87-94, or in the alternative, are protected by the First Amendment against any application of the DMCA, Am. Compl. ¶ 103. Even under the heightened scrutiny supposedly required by the government's principal case, United Public Workers v. Mitchell, 330 U.S. 75 (1947),<sup>16</sup> the Plaintiffs have submitted sufficient facts to describe their projects in detail.

Mr. Craver has submitted source code for the program the individual Plaintiffs used to attack SDMI Technology F. See Craver Supp. Decl. Exhibit 1 (filed under seal). No one can say that this program is too "hypothetical," "speculative," or "lacking in detail" to constitute a specific dispute between the parties. And while Mr. Craver has not completed the program he is writing for his dissertation project on "forensic analysis" of digital music, it defeats the point of preenforcement review for him to be required to complete it before the legality of his actions can be adjudicated. Craver Decl. ¶¶ 20-26; Craver Supp. Decl. ¶¶ 24-25 (describing program that detects watermarks or other information hidden within digitized music).

The other projects are likewise sufficiently described to avoid any ripeness problem. Prof. Felten describes the Scientific American article he would write in great detail. Felten Supp. Decl. ¶¶ 4-6. The controversy over Prof. Wu and Prof. Liu's book centers on the chapter of Prof. Wu's dissertation that specifically addresses the Plaintiffs' attacks on SDMI technologies. The

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<sup>16</sup>The government's near-exclusive reliance on Mitchell is misplaced. Chemerinsky notes that "United Public Workers v. Mitchell is difficult to reconcile with the many cases holding that a case is ripe when a person is forced to choose between forgoing possibly constitutionally protected conduct or facing significant sanctions." FEDERAL JURISDICTION at 104-05. Wright & Miller describe it as a case that "deserves to be . . . gently distinguished into oblivion." 13A FEDERAL PRACTICE AND PROCEDURE, § 3532.4. The case has been called into doubt ever since United States Civil Service Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973), in which the Supreme Court permitted a challenge on allegations hardly more specific than those rejected in Mitchell. See Image Carrier Corp. v. Beame, 567 F.2d 1197, 1202 (2d Cir. 1977).



book chapter will not be identical to Chapter 10 of Prof. Wu’s dissertation, but it should not be necessary for them to have a complete, final copy to have their claim resolved when it is based on an already published dissertation.<sup>17</sup>

The detail supplied by Prof. Liu concerning the kind of research he would like to carry out on SDMI and related technologies and the detail supplied by Prof. Wallach about the article he did not write are more than Mitchell demands. Prof. Liu describes his research as

address[ing] such issues as: i) the general properties of the kinds of technologies we examined during the public challenge, ii) whether these particular technologies are special cases of more general, more powerful technologies, iii) the fundamental limitations of a particular technology, iv) the number of bits of information that can be reliably embedded using a particular technology, or v) the robustness of the technologies under intentional and unintentional attacks.

Liu Decl. ¶ 26. Prof. Wallach describes his article as one that “would trace the history of copyright protection measures beginning some thirty years ago and through the SDMI challenge. . . . [which] would include details about the systems and ways that they were defeated, including details about the technologies involved in the SDMI challenge.” Wallach Decl. ¶ 24.

These projects are sufficiently detailed to survive Mitchell and present a live controversy as to Plaintiffs’ First Amendment claim.

Finally, Plaintiffs’ claim that Congress exceed its Constitutional powers, Am. Compl. ¶¶ 110 - 114, involves the resolution of purely legal issues. Did Congress have the power to enact the DMCA under the Intellectual Property Clause, U.S. Const. Art. I, § 8, cl. 8, when the DMCA bans technologies regardless of whether they are actually used to gain access to, or infringe

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<sup>17</sup> The government appears to echo the private Defendants’ point that Plaintiffs’ future publications cannot be evaluated before they are completely written. See Gov. Br. at 22. No such specificity is required even under Mitchell, and if it were, Letter Carriers and other cases decided by the Supreme Court cannot be explained. See, e.g., Times Film Corp. v. City of Chicago, 365 U.S. 43, 46-47 (1961) (reaching decision on the merits concerning film “Don Juan,” although “there [was] not a word in the record as to the nature and content of [the film]”). Indeed, when a statute is so vague, First Amendment law requires that the law be adjudicated on its face. See Bd. of Airport Comm’rs v. Jews for Jesus, Inc., 482 U.S. 569, 575-576 (1987).

copyright in, a copyrighted work? If not, could Congress validly bypass the Patent and Copyright Clause and enact the DMCA under its Commerce Clause or Necessary and Proper Clause powers? These questions involve no factual development whatsoever, and therefore present no ripeness issue.

C. A Favorable Decision By This Court Would Have Significant Practical Utility for the Plaintiffs and Others

The final Step-Saver factor asks “whether the parties’ plans of action are likely to be affected by a declaratory judgment” and focuses on the practical effects of a judgment on the parties. Presbytery of New Jersey, 40 F.3d at 1469-70. “The Declaratory Judgments Act was enacted ‘to clarify the legal relationships so that plaintiffs (and possibly defendants) could make responsible decisions about the future.’” Travelers Ins., 72 F.3d at 1155 (quoting Step-Saver, 912 F.2d at 650).

Plaintiffs’ present and near-future projects, and their ability to make “responsible decisions,” will be immediately and directly affected by a decision. If the Plaintiffs receive a ruling in their favor, Prof. Felten will write an article on the SDMI challenge for Scientific American; Mr. Craver will publish his “tinywarp.c” program. Prof. Liu will be able to converse freely with his colleagues, Liu Supp. Decl. ¶ 4, and choose to conduct research on SDMI and related technologies on the basis of what he believes would be scientifically interesting or useful rather on what research creates the greatest risk of exposure under the DMCA, see Liu Decl. ¶ 26. The other Plaintiffs would be also free to engage in the research of their choice and publish and discuss what they believe is of scientific interest.

Without some resolution of their potential liability under the DMCA, Prof. Felten will refrain from publishing his article. Mr. Craver will not publish “tinywarp.c” and will have to proceed on his dissertation project without knowing what he can publish. Professors Wu and Liu will not submit a manuscript that contains anything other than “immaterial, grammatical” changes to Chapter 10. See RIAA Br. In Support of Its Motion to Dismiss; Wu Supp. Decl. ¶ 3;

Liu Supp. Decl. ¶ 3. Professors Liu, Felten, Wu and Wallach, each of whom have teaching and advisory roles, will remain uncertain how to advise students who may be interested in studying areas that may place the students at risk under the DMCA. See, e.g., Liu Decl. ¶ 28; Felten Decl. ¶ 118.

Since Plaintiffs raise a First Amendment facial challenge, the effect of the DMCA on scientists and scientific organizations not before the Court is also relevant. See Presbytery of New Jersey, 40 F.3d at 1470. Scientists, other than the Plaintiffs, in encryption research and information hiding have been chilled by the DMCA. See Wagner Decl. ¶ 66; Ferguson Decl. ¶ 8; Spafford Decl. ¶ 15; Blaze ¶ 21. There is a fear that scientists will choose other fields of research. McHugh Decl. ¶ 11. One prominent researcher does “not think [he] will ever conduct research involving copy protection again” after his experience submitting a paper showing the vulnerability of a copy protection system for controlling digital video transmissions. See Wagner Decl. ¶¶ 55, 67; see generally ¶¶ 55-67. “After spending much time worrying about the DMCA, I have concluded that I cannot afford to work in any area that exposes me to such risks. The costs are simply too high: I spent more time speaking with lawyers than I spent on the scientific research itself. And I cannot in good conscience advise students in my research group to work in areas that would expose them to unknown legal risks.” Id. ¶ 66. If the DMCA prohibited the circumvention of firewalls (i.e., network access controls), Prof. Wagner would have to abandon half of the security research he does. Id. ¶ 71.

Many scientists and researchers have expressed serious concerns that the DMCA’s effect on encryption and information hiding may result in less research and therefore less secure systems for the public. See Blaze Decl. ¶ 19; Lazowska Decl. ¶ 21; Schneier Decl. ¶¶ 22-23. “The robust and healthy advance of the sciences of cryptography and computer security are critical to our electronic future. If we are to turn computers and computer networks into serious business and social tools, we need strong security systems. The only way to build strong security systems is through open design and peer review. The only way to facilitate peer review is to

allow unfettered access to security systems for analysis, and unimpeded allowances to publish results: both positive and negative.” Id. ¶ 23. See also Spafford Decl. ¶ 15 (because of the DMCA, researchers studying ways of protecting against viruses and other malicious code, “including myself, have limited or altogether stopped development and distribution of forensic tools . . .”); see generally id. ¶¶ 11-15.<sup>18</sup>

The two fields at greatest risk are encryption (cryptography) and information hiding (steganography) because these fields study the underlying technologies that are used for copyright control measures. The DMCA can reach all analytic encryption research (i.e., encryption research on existing security systems), see Felten, Decl. ¶ 106, and may “eviscerate” the field of information hiding, Craver Supp. Decl. ¶¶ 19, 22.

Because of the DMCA, the United States may lose its stature as the center of security research. Foreign researchers have curtailed their visits to the United States, Lazowska Decl. ¶ 27, and scientific organizations have altered their plans to hold conferences U.S. See Reiter Decl. ¶ 10; Anderson Decl. ¶ 12. Some have considered changing their plans to visit, and others have called for a boycott of conferences in the U.S. See, e.g., Anderson Decl. ¶¶ 13, 15; Cox Decl. ¶ 7. “Research will continue in other countries where the laws do not mirror the provisions of the DMCA that restrict publication . . . As a result, the locus of research in this critical area will move outside the United States, posing additional threat to the U.S.” Anderson Decl. ¶ 18.

A statute that “interferes with the way a plaintiff would normally conduct his affairs” is especially appropriate for preenforcement review. See Int’l Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 819 (5th Cir. 1979). The record amply shows that potential

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<sup>18</sup>The cloud over “information hiding” is especially ironic given that it has apparent national security implications. See Spafford Decl. ¶¶ 18-19. Congress may not have intended this result, but it is a reminder that “governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.” Reno v. ACLU, 521 U.S. at 885.

liability under the DMCA interferes with the professional work of the Plaintiffs and other scientists and threatens their First Amendment rights. Laws that threaten speech must be “protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.” Bates v. Little Rock, 361 U.S. 516, 523 (1960). A favorable ruling by this Court would resolve the chill and uncertainty among other scientists, researchers and scientific organizations who have been chilled or are uncertain of their potential liability under the DMCA.

### CONCLUSION

For the forgoing reasons, the government’s motion to dismiss for lack of jurisdiction should be denied.

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