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v.
321 STUDIOS, also known as 321 Studio,
LLC.; ROBERT MOORE, an individual;
ROBERT SEMAAN, an individual; and
VICTOR MATTISON, an individual,

Counterclaim Defendants.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 28, 2003 at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Susan Illston, United States District Judge, in Courtroom 10 on the 19th Floor, 450 Golden Gate Avenue, San Francisco, California. Defendants and Counterclaimants Metro Goldwyn-Mayer Studios Inc., TriStar Pictures, Inc., Columbia Pictures Industries, Inc., Sony Pictures Entertainment Inc., Time Warner Entertainment Co. L.P., Disney Enterprises, Inc., Universal City Studios LLLP, formerly known as Universal City Studios, Inc., and The Saul Zaentz Company ("the Studios") will and hereby do move for summary adjudication in favor of the Studios and against Plaintiff/Counterclaim Defendant 321 Studios ("321") on 321's First Claim (Declaratory Relief under the DMCA, 17 U.S.C. Section 1201 *et seq.*), for summary adjudication that 321 is liable on the Studio's Counterclaim (violation of the DMCA, 17 U.S.C. § 1201), and for an order dismissing as moot 321's Second Claim (Declaratory Relief, Direct, Vicarious or Contributory Infringement, [1]7 U.S.C. Section 101 *et seq.*).

The Studios seek an order adjudicating (1) that 321 is not entitled to a declaratory judgment that its products DVD Copy Plus and DVD-X Copy are legal under 17 U.S.C. § 1201 and is not entitled to a declaratory judgment that the DMCA is invalid or unconstitutional, (2) that 321 is liable for violation of Section 17 U.S.C., and (3) dismissing 321's Second Claim for Relief as moot.

1 This Motion is based on this Notice of Motion and Motion, the Memorandum of Points
2 and Authorities and Declarations of Robert W. Schumann and Marc E. Mayer served and filed
3 concurrently herewith, on the pleadings and records on file in this action, and on such other
4 argument and evidence as may be presented to this Court at or before the hearing on this
5 Motion.

6
7 DATED: January 10, 2003

8 RUSSELL J. FRACKMAN
9 PATRICIA H. BENSON
10 STEVEN B. FABRIZIO
11 MITCHELL SILBERBERG & KNUPP LLP

12 By: _____
13 Russell J. Frackman
14 Attorneys for Plaintiffs

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TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	I. STATEMENT OF THE ISSUES..... 2
4	II. STATEMENT OF UNDISPUTED BACKGROUND FACTS..... 2
5	A. The Studios and DVD Technology..... 2
6	B. “CSS” And DVD Anti-Piracy Technology..... 3
7	C. The DMCA Anti-Circumvention Provisions..... 5
8	D. “DeCSS” and the <i>Corley</i> Litigation..... 6
9	E. 321 and The DVD Circumvention Software 7
10	F. 321’s Admissions That Its Software Circumvents CSS Technology 8
11	G. The Current Litigation 9
12	H. The Elcom Litigation 10
13	III. THE LEGAL STANDARD..... 10
14	IV. 321 IS LIABLE UNDER THE ANTI-CIRCUMVENTION PROVISIONS OF THE
15	DMCA..... 11
16	V. THE ANTI-CIRCUMVENTION PROVISIONS OF THE DMCA ARE NOT INVALID
17	OR UNCONSTITUTIONAL..... 15
18	A. Congress Did Not Exceed Its Constitutional Power in Enacting the DMCA..... 16
19	B. The DMCA Does Not Conflict With Or Otherwise Eliminate Fair Use 18
20	C. Section 1201 Does Not Violate the First Amendment..... 20
21	1. The DMCA Is Content-Neutral 20
22	2. The DMCA Promotes Substantial Governmental Interests And Is Tailored
23	To Further Those Interests 22
24	D. Section 1201 Is Not Unconstitutionally Vague 23
25	VI. 321 SHOULD BE ENJOINED FROM MANUFACTURING, DISTRIBUTING, OR
26	OTHERWISE TRAFFICKING IN THE DVD CIRCUMVENTION SOFTWARE 24
27	CONCLUSION..... 25
28	

TABLE OF AUTHORITIES

Page

CASES

1		
2		
3		
4	<u>Celotex Corp. v. Catrett,</u>	
5	477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	10
6	<u>Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.,</u>	
7	896 F.2d 1542 (9th Cir. 1990)	2
8	<u>Posters 'N' Things, Ltd. v. United States,</u>	
9	511 U.S. 513 (1994).....	24
10	<u>Preiser v. Newkirk,</u>	
11	422 U.S. 395 (1975).....	2
12	<u>RealNetworks, Inc. v. Streambox, Inc.,</u>	
13	Case No. 2:99-CV-02070, 2000 WL 127311 (W.D. Wash., Jan. 18, 2000).....	13, 14
14	<u>Richmond Boro Gun Club, Inc. v. City of New York,</u>	
15	97 F.3d 681 (2d Cir. 1996).....	24
16	<u>Sable Communications of California, Inc. v. FCC,</u>	
17	492 U.S. 115 (1989).....	20
18	<u>Sony Computer Entertainment America Inc. v. GameMasters,</u>	
19	87 F. Supp. 2d 976 (N.D. Cal. 1999)	14
20	<u>Turner Broad. System, Inc., v. FCC</u>	
21	520 U.S. 180 (1997).....	18
22	<u>Turner Broadcasting System, Inc. v. FCC,</u>	
23	512 U.S. 622 (1994).....	20, 22
24	<u>U.S. v. Lopez,</u>	
25	514 U.S. 549 (1995).....	17, 18
26	<u>United States v. Elcom, Ltd.,</u>	
27	203 F. Supp. 2d 1111 (N.D. Cal. 2002)	2, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24
28	<u>United States v. Moghadam,</u>	
	175 F.3d 1269 (11th Cir. 1999)	17, 18
	<u>Universal City Studios, Inc. v. Corley,</u>	
	273 F.3d 429 (2d Cir. 2001).....	1, 5, 6, 7, 8, 16, 19, 20, 21, 22, 23
	<u>Universal City Studios, Inc. v. Reimerdes,</u>	
	82 F. Supp. 2d 211 (S.D.N.Y. 2000).....	1, 3, 4, 6, 7, 8, 12, 13, 14, 15, 21, 24, 25

1 Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.
2 455 U.S. 489 (1982).....24

3 Woods v. Cloyd W. Miller Co.
4 333 U.S. 138 (1948).....18

5 **STATUTES**

6 17 U.S.C. §106.....13

7 17 U.S.C. §10715

8 17 U.S.C. § 1201 et seq.....1, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24

9 18 U.S.C. § 2319A.....17

10 37 CFR Part 201, 65 Fed. Reg. 64556-01, at 6456115, 19, 20, 25

11 47 U.S.C. § 553(a)(2).....16

12 **MISCELLANEOUS**

13 H.R. Rep. No. 105-551(I), at 17 (1998).....11

14 S. Rep. No. 105-190, at 10 (1998)5, 6, 12, 16, 18, 23

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1 **Introductory Statement**

2 The action filed by Plaintiff/Counterclaim Defendant 321 Studios, LLC. ("321") is the
3 most recent in a series of unsuccessful challenges to the anti-circumvention provisions of the
4 Digital Millennium Copyright Act ("DMCA"). The DMCA expressly and unambiguously
5 prohibits trafficking in "any technology, or product...or part thereof," that primarily is designed
6 to circumvent any access-control or other technological measures implemented by a copyright
7 holder to protect its rights in its copyrighted works, including the exclusive right to copy. 17
8 U.S.C. §§1201(a) and 1201(b). In violation of the DMCA, 321 is trafficking in software
9 designed *expressly* to circumvent the access-control and copy-prevention system incorporated
10 into the DVDs containing copyrighted motion pictures that are commercially released by
11 Defendants/Counterclaimants (the "Studios").

12 In its claim for declaratory relief, 321 concedes that the software it distributes is designed
13 to permit the copying of the Studios' encrypted copyrighted motion pictures on DVDs. FAC ¶¶
14 1, 23, 26, 28, 29. By that concession, 321 necessarily admits that its software is designed to
15 circumvent the encryption protection embedded in those DVDs. Thus, *the* material fact
16 necessary to decide both 321's challenge to section 1201 and the Studios' counterclaim for
17 violation of section 1201 is undisputed. No discovery on this dispositive issue is necessary.
18 Therefore, in the interests of economy and efficiency, the Studios move for summary
19 adjudication of 321's First Claim for Declaratory Relief Under the DMCA and of the Studios'
20 Counterclaim for violation of section 1201.

21 The legal issues involved – the validity and applicability of the DMCA – previously have
22 been analyzed and decided in two cases. 321, which is based in Missouri, filed this declaratory
23 relief action after the Second Circuit, affirming the District Court's judgment in a lawsuit brought
24 by most of the same motion picture studios that are Defendants and Counterclaimants in this
25 case, had flatly rejected, in a highly-publicized opinion, the precise arguments 321 advances
26 here. Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001), *aff'g*, Universal City
27 Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294 (S.D.N.Y. 2000). Forum shopping in no way has
28 improved 321's arguments, however. After this case was filed, a third court, in this district, also

1 rejected the same Constitutional challenges that 321 raises here. United States v. Elcom, Ltd.,
2 203 F. Supp.2d 1111 (N.D. Cal. 2002) (Whyte, J.)

3 If the Court determines that 321's products violate the anti-circumvention provisions of
4 the DMCA, then 321 must stop distributing those products (and will be liable for damages).
5 Therefore, there will not be any current, judicable controversy as to whether, by selling its
6 circumvention products, 321 also is liable for copyright infringement – which is the issue raised
7 in 321's Second Claim for Declaratory Relief – and that claim will be moot. Hal Roach Studios,
8 Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1555-56 (9th Cir. 1990) (request for
9 declaration of non-infringement presents an actual case or controversy "if the plaintiff has a real
10 and reasonable apprehension that he will be subject to liability [for infringement] if he continues
11 to manufacture his product"); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("[A]n actual
12 controversy must be extant at all stages of review, not merely at the time the complaint is filed").
13 Accordingly, 321's Second Claim would be dismissed as moot. ATMI, Inc. v. Innovative
14 Engineering Solutions, Inc., 2002 WL 826794 at *1 (N.D. Cal. 2002) (Illston, J.) (granting
15 plaintiff partial summary judgment on its claim for declaratory judgment that defendant did not
16 own certain patents, and dismissing as moot plaintiff's claim for declaratory judgment that it did
17 not infringe those patents).

18 **I. STATEMENT OF THE ISSUES**

- 19 1. Does the manufacture and trafficking in software that circumvents copying and
20 access control measures violate the "anti-circumvention" provisions of the DMCA?
21 2. Are the DMCA's anti-circumvention provisions unconstitutional?
22

23 **II. STATEMENT OF UNDISPUTED BACKGROUND FACTS¹**

24 **A. The Studios and DVD Technology**

25 The Studios, directly or through affiliates, are engaged in the business of producing and
26 distributing motion pictures and other copyrighted works. FAC ¶5; AC ¶ 5. The Studios
27

28 ¹ The facts derived from 321's First Amended Complaint ("FAC") and Answer to
Counterclaim ("AC") are assumed to be true for purposes of this Motion only.

1 distribute motion pictures theatrically, by television transmission, and on portable media, such as
2 videocassette tapes and DVDs (an acronym for "Digital Versatile Discs"). FAC ¶ 5, 19;
3 Reimerdes, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

4 A DVD is a digital storage medium, similar in shape and size to the "compact disc"
5 ("CD") medium that is used for the storage of audio files. FAC ¶ 19; Declaration of Robert W.
6 Schumann ("Schumann Decl."), ¶ 7. Because a DVD is capable of storing several times the
7 amount of data that can be stored on a CD, DVDs are used to store the digital video and audio
8 information that comprises a full-length motion picture (or other audiovisual work). FAC 19;
9 Schumann Decl., ¶¶ 8-9; Reimerdes, 111 F. Supp. 2d at 307. DVDs can be viewed either on a
10 television equipped with a stand-alone DVD player or on a computer with a DVD-Rom and
11 specialized playback software ("DVD Player" software). FAC ¶ 20; Schumann Decl., ¶ 9.
12 DVDs are the latest technology for private home viewing of recorded motion pictures, and
13 provide a significant improvement on audio and visual quality as compared to video cassette

1 CSS is an integrated system of access "locks," encryption technology and licensing
2 provisions that protect the contents of a DVD from unauthorized access and copying.
3 Reimerdes, 111 F. Supp. 2d at 309-10; Schumann Decl., ¶ 14. 321 accurately summarizes the
4 encryption elements of CSS:

5 "Most DVDs manufactured, distributed or sold by the [Studios] are
6 recorded onto the DVD in a scrambled format in which the data is
7 encrypted in order to prevent unauthorized access to the data
8 contained on the DVD. . . . [The Studios] have adopted CSS as a
9 standard encryption technique to prevent access to DVD data. CSS
10 works by scrambling the digital data that makes up each frame of
11 video images. The CSS standard, as well as the licensing of the
12 electronic encryption 'keys' necessary to play back the DVDs, is
13 administered by an organization known as the Copyright Control
14 Authority (CCA). The CSS 'keys' are licensed to the makers of
15 DVD players and DVD software. A CSS-protected DVD can only
16 be played back or viewed by DVD players or computer software
17 which contain the 'keys' licensed by the CCA, either directly or
18 through subcontracts. When the CSS-encrypted DVD is placed in
19 a licensed DVD player, the DVD player uses software and
20 electronic decryption 'keys' in order to unscramble the data and
21 display the frames that make up the video images." FAC ¶23.

22 CSS also has a "locking" mechanism so that the computer's DVD drive will not allow
23 access to a DVD's content until it confirms that the DVD player software seeking access is an
24 authentic, CCA-licensed player. Schumann Decl. ¶ 15. The CSS locking mechanism and
25 encryption are independent and complementary protections. Id., ¶ 14, 16. Only players and
26 drives equipped with both the proper authentication credentials and the necessary "keys" are able
27 to access and decrypt CSS-encrypted DVD files and thereby play the motion pictures stored on
28 DVDs. Id., ¶¶ 16-20. In order to ensure that CSS decryption technology (1) would not become
generally available, and (2) would only be used to play – and not to copy – DVDs, CCA licenses
CSS subject to strict requirements, including that authorized DVD players not permit copying.
Id., ¶ 14; Reimerdes, 111 F.Supp. 2d at 310. As a result of CSS and the CCA licensing
procedures, DVDs encrypted with CSS cannot be accessed (played) on noncompliant players and
cannot be digitally copied (including on a personal computer) unless CSS protection is
circumvented. Id. ¶ 21.

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C. The DMCA Anti-Circumvention Provisions

Congress enacted the DMCA in 1998. (It is codified in the Copyright Act at 17 U.S.C. §§1201 et seq.). A key element of the digital protection enacted as part of the DMCA was to "provide 'legal protection and effective legal remedies' against circumventing technological



