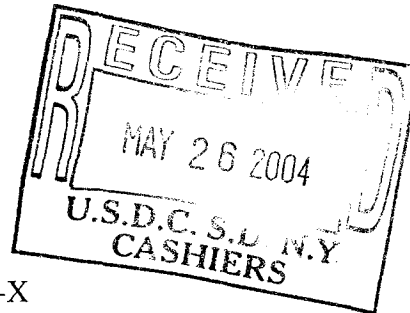


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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PARAMOUNT PICTURES CORPORATION and
TWENTIETH CENTURY FOX FILM CORPORATION,

Plaintiffs,

04^{No} CV 3995

- against -

TECHNOLOGY ONE a/k/a TECHNOLOGY 1,
Defendant.

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

Defendant Technology One distributes the "DVD X Copy" line of software products. Two federal courts, including this one, have found that this software violates the Digital Millennium Copyright Act of 1998 ("DMCA"), 17 U.S.C. § 1201, *et seq.*, by circumventing the Content Scramble System ("CSS") used by the motion picture industry to prevent piracy of films distributed on DVDs. *See Paramount Pictures v. 321 Studios*, 2004 WL 40276, *2 (S.D.N.Y. March 3, 2004); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.* 307 F. Supp. 2d 1085, 1105 (N.D. Cal. Feb. 19, 2004). Despite knowledge of these decisions and Plaintiffs' repeated requests that it cease and desist, Technology One obstinately continues to distribute the DVD X Copy products.

The plaintiffs in this case are Paramount Pictures Corporation and Twentieth Century Fox Film Corporation. They are among the world's major motion picture studios and are large-scale distributors of copyrighted filmed entertainment on CSS-protected DVDs. Prior to initiating this action, Plaintiffs Fox and Paramount brought suit in this jurisdiction against 321 Studios, the manufacturer of the DVD X Copy products at issue here. 321 Studios' manufacture and distribution of those products is now enjoined. *Paramount Pictures Corp. v. 321 Studios*, 2004 WL 402756, *2 (S.D.N.Y. March 3, 2004).

In entering the injunction against 321, Judge Owen relied on precedents set forth in the landmark *Reimerdes* litigation, in which Judge Kaplan, after considerable analysis, entered an injunction against persons who were trafficking in similar software designed to circumvent CSS, see *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (ordering preliminary injunction); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (ordering permanent injunction); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (affirming permanent injunction). Noting that "321 Studios' conduct at issue in this case is essentially identical to what this Court and the Second Circuit have heretofore held violates the anti-trafficking provisions of the DMCA," Judge Owen enjoined 321 Studios, "its agents . . . and all persons acting in concert with it . . . from [m]anufacturing, importing, offering to the public . . . providing or otherwise trafficking in DVD X Copy Platinum, DVD X Copy Gold, DVD X Copy Xpress, DVD X Copy, [and] DVD Copy Plus" *Paramount Pictures v. 321 Studios*, 2004 WL 40276 at *2.

Two weeks prior to Judge Owen's entry of a preliminary injunction against 321, the United States District Court for the Northern District of California similarly found that 321's DVD X Copy products violated the DMCA, and entered a permanent injunction prohibiting 321

from manufacturing or distributing such products. *See 321 Studios v. Metro Goldwyn Mayer Studios*, 307 F. Supp.2d at 1105.

Despite both courts' clear holdings that the distribution of DVD X Copy products violates the DMCA, and despite repeat warning from Plaintiffs, Technology One continues to traffic in these very products. As discussed in detail below, the distribution of such software poses a real and immediate threat to Plaintiffs. Accordingly, Plaintiffs respectfully request that this Court immediately issue a preliminary injunction prohibiting Technology One from distributing these illegal products.

STATEMENT OF FACTS

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

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

2. A DVD ("digital versatile disc") is a digital storage medium, a plastic disc five inches in diameter that is capable of storing a full-length motion picture. In addition to their compact size, DVDs also offer significant audio and visual advantages over videocassettes or other analog media, as they provide superior audio and visual fidelity and are less subject to

¹ Mr. Schumann's testimony also was relied on by Judge Kaplan in the *Reimerdes* litigation; Mr. Schumann's attached Declaration was submitted to Judge Owen in support of Plaintiffs' Motion for a Preliminary Injunction in *Paramount v. 321 Studios*.

deterioration over time. However, the DVD is also a tempting target for would-be copyright pirates because the very nature of the digital format means that the works contained on DVDs can be copied from generation to generation without degradation. Once copied, the content of these DVDs can be burned onto an unlimited number of writable DVDs or CD-Rs, and/or readily distributed over the Internet, virtually instantaneously and to millions of people. This problem is not merely hypothetical. On popular Internet file-copying services, scores of digital copies of films are available free for download. *See* Exh. 1 Schumann Decl. at ¶ 27.

3. Before proceeding with plans to release their copyrighted works in the DVD format, a number of copyright owners including Plaintiffs adopted the CSS copy-control and access-control technology designed to protect digital content from copyright infringement. CSS is comprised of an integrated system of access “locks,” encryption technology, and licensing provisions that protect the contents of a DVD from unauthorized access—that is, access other than by a licensed DVD player—as well as from copying. *Reimerdes*, 111 F. Supp. 2d at 309-10. As Judge Kaplan explained:

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

Reimerdes, 111 F. Supp. 2d at 308 (footnotes omitted).

4. In 1999, the computer “hacker” community began distributing over the Internet a software utility known as “DeCSS,” which allowed a user to decrypt and defeat the access-control and copy-control provided by CSS and thereby copy, manipulate, or transfer the

content of DVDs. In January 2000, a number of copyright owners, including Plaintiffs, initiated the *Reimerdes* litigation referenced above, with Judge Kaplan eventually finding, after a full evidentiary hearing, that “[t]here is no serious question that defendants’ posting of DeCSS violates the DMCA.” *Reimerdes*, 111 F. Supp. 2d at 304. Relying heavily on “Judge Kaplan’s extremely lucid opinion,” *Corley*, 273 F.3d at 435, the Second Circuit affirmed. *Id.* at 460.

5. In August 2001, a St. Louis company doing business under the name “321 Studios” began manufacturing and distributing software that is functionally identical to DeCSS in that it permits users to circumvent CSS to make copies of the motion pictures contained on DVDs, including copies that can be distributed over the Internet and by other means. 321 marketed this software under the names DVD X Copy Platinum, DVD X Copy Gold, DVD X Copy Xpress, and DVD Copy Plus.

6. 322 Studios filed a declaratory action in the Northern District of California on April 22, 2002, asking that the court declare that its software products did not violate the DMCA, or, in the alternative, declare the Act unconstitutional. *See 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 3d 1085 (N.D. Cal. 2004). On November 13, 2003, Plaintiffs Fox and Paramount, who were not parties to the California action, filed suit against 321 Studios in this jurisdiction, seeking damages and preliminary injunctive relief. On March 3, 2004, this Court entered a preliminary injunction against 321 Studios’ distribution of the DVD X Copy products; approximately one week prior, the United States District Court for the Northern District of California entered a permanent injunction prohibiting essentially the same conduct. *Id.*

7. Since the entry of the preliminary injunction, Plaintiffs have diligently waged a cease-and-desist campaign against those who continue to distribute 321 Studios’ illegal

products. In carrying out that campaign, Plaintiffs became aware on or about April 22, 2004, that Technology One, through its www.saveintheusa.com and www.save365.com websites, provides, offers to the public, distributes, and otherwise traffics in (in New York and elsewhere) 321 Studios' DVD X Copy Gold, DVD X Copy Platinum, and DVD X Copy Xpress software products. On that date, counsel for Plaintiffs wrote to Technology One demanding that it cease and desist from selling these illegal products and enclosing copies of the injunctions issued by this Court and the Northern District of California. *See* Exh. 2. Counsel for Plaintiffs followed up with a phone call to Technology One and were directed to speak with an individual who identified himself as "Dan Minsky." Over the course of several phone conversations, Mr. Minsky stated that Technology One would not agree to cease its sales of 321's illegal software. *See* Exhibit 3 (Terry Decl.) at ¶ 5.

8. Technology One's websites make clear that this software is intended to facilitate unauthorized copying of CSS-protected DVDs containing copyrighted works. It references DVDs containing episodes of the popular television programs "The Simpsons" and "The Sopranos." *See* Exh. 4. In addition to the casual piracy promoted on Technology One's websites, the DVD X Copy products have been used to commit commercial piracy. *See* Exh. 5.

ARGUMENT

I. TECHNOLOGY ONE SHOULD BE ENJOINED FROM DISTRIBUTING THE DVD X COPY SOFTWARE PRODUCTS.

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

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

As in *Reimerdes* and *Paramount v. 321 Studios*, this standard is easily met here and the requested injunction should be entered.²

A. **Plaintiffs Are Likely to Prevail on the Merits.**

In the past three months, both this Court and the United States District Court for the Northern District of California have concluded that the sale of the DVD X Copy products violates the DMCA. *See Paramount v. 321 Studios*, 2004 WL 40276 at *2; *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d at 1105. The reasoning behind those holdings is unassailable and applies with equal force to Technology One’s sale of the products.

The Complaint alleges that Technology One has violated two independent provisions of the DMCA, known as the “anti-trafficking” provisions: (1) the access-protection provisions of section 1201(a)(2); and (2) the copy-protection provisions of section 1201(b)(1).

As explained below, Technology One is liable under both provisions:

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

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

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

² Less than a year ago, Judge Pauley of this Court also entered a preliminary injunction against the distribution of circumvention software in similar circumstances. *See Paramount Pictures Corp. v. Internet Enterprises*, 2003 WL 21517839, *1 (S.D.N.Y. June 24, 2003). All in all, Judge Pauley has entered injunctions against nine different distributors of DeCSS.

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

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

17 U.S.C. § 1201(a)(2).

Section 1201(b) provides that:

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

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

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

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

17 U.S.C. § 1291(b)(1)

While both of these provisions of section 1201 prohibit trafficking in circumvention technology, they serve distinct purposes: “the focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes copyright.” *Corley*, 273 F.3d at 441

(emphasis in original). Construed together, these provisions reflect a recognition by Congress that technological safeguards employed by copyright owners can never alone adequately protect creative works against a diffuse global network of Internet-linked individuals who seek to traffic in and profit illegally from the creative works of others. As the Second Circuit explained in *Corley*:

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

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

Defendant’s conduct at issue in this case is identical to what this Court has held violates these provisions of the DMCA. As Judge Owen explained:

I find that manufacturing *and distributing* DeCSS software for sale violates the anti-trafficking provisions of the DMCA. Of identical outcome is the recent decision in the Northern District of California involving the same software at issue in this case, the Court issuing an injunction against the *manufacture and distribution* of 321 Studios’ DVD copying software The Court there found that ‘321’s software is in violation of both § 1201(a)(2) and § 1201(b)(1), because it is both primarily designed and produced to circumvent CSS and marketed to the public for use in circumventing CSS.’

See Paramount v. 321 Studios, 2004 WL 402756 at *1-2 (emphasis added); *see also 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d at 1099.

Although Technology One does not manufacture the DVD X copy line of products, it does distribute, offer to the public, and otherwise traffic in these products. As such, there can be no serious question that Plaintiffs are likely to succeed on the merits.

B. 321 Studios' Continued Sale of the DVD-Copying Software Will Cause Plaintiffs Irreparable Injury.

A plaintiff who demonstrates a likelihood of succeeding on a claim under 17 U.S.C. § 1201 is entitled to a presumption of irreparable injury absent an injunction. “[J]ust as in the case of direct copyright infringement, the extent of the harm plaintiffs will suffer as a result of defendants’ alleged activities cannot readily be measured, suggesting that the injury truly would be irreparable.” *Reimerdes*, 82 F. Supp. 2d at 215; *see also Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 2003 U.S. Dist. LEXIS 3734 at *75 (E.D. Ky. Feb. 27, 2003) (“a plaintiff that demonstrates a likelihood of success on the merits of its claim for violation of the anti-trafficking provisions of the DMCA is entitled to a presumption of irreparable injury”).

That such irreparable injury exists in this case is evident from Judge Owen’s entry of a preliminary injunction against 321 Studios’ manufacture or distribution of the DVD X Copy products. *See Paramount Pictures v. 321 Studios*, 2004 WL 40276, *2. Obviously, if grounds exist for enjoining the DVD X Copy products at their source, as Judge Owen has done, these same grounds justify enjoining these products elsewhere in the distribution chain. In any event, Judge Kaplan’s observations upon entering the permanent injunction in *Reimerdes* make plain that the presumption of harm arising from the dissemination of DVD-copying software is well founded:

[T]he availability of DeCSS on the Internet effectively has compromised plaintiffs’ system of copyright protection for DVDs, requiring them either to tolerate increased piracy or to expand resources to develop and implement a replacement system unless the availability of DeCSS is terminated. It is analogous to the

publication of a bank vault combination in a national newspaper. Even if no one uses the combination to open the vault, its mere publication has the effect of defeating the bank's security system, forcing the bank to reprogram the lock. Development and implementation of a new DVD copy protection system, however, is far more difficult and costly than reprogramming a combination lock and may carry with it the added problem of rendering the existing installed base of compliant DVD players obsolete.

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

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

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

This observation, made three years ago, has been borne out by events. An Illinois man recently charged with pirating DVDs confessed to authorities that he purchased and used 321 Studios' DVD X Copy software product "so that he could copy new releases for his customers." *See* Exh. 5 (Declaration of Det. Christopher Burne). Meanwhile, pirated copies of motion pictures continue to proliferate throughout Internet file-trading systems and services. *See* Exh. 1 (Schumann Decl.) at ¶ 27. Absent an injunction against Technology One's continued sale of DVD-copying software in violation of the DMCA, the "grave[] injur[y]" identified by Judge Kaplan will persist.

CONCLUSION

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

Respectfully submitted,

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May 26, 2004