

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

EDWARD W. FELTEN; BEDE LIU;
SCOTT A. CRAVER; MIN WU;
DAN S. WALLACH; BEN
SWARTZLANDER; ADAM
STUBBLEFIELD; RICHARD DREWS
DEAN; and USENIX ASSOCIATION,
a Delaware non-profit non-stock
corporation,

Plaintiffs,

vs.

RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.; SECURE DIGITAL
MUSIC INITIATIVE FOUNDATION;
VERANCE CORPORATION; JOHN
ASHCROFT, in his official capacity as
ATTORNEY GENERAL OF THE
UNITED STATES; DOES 1 through
4, inclusive, Defendants.

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

**PLAINTIFFS' BRIEF IN OPPOSITION
TO RIAA, SDMI AND VERANCE'S MOTION TO DISMISS**

Of Counsel:
Gino Scarselli
Lee Tien
James S. Tyre

Grayson Barber
Grayson Barber LLC
68 Locust Lane
Princeton, New Jersey 08540
(609) 921-0391

On the Brief:
Lee Tien
Gino Scarselli
Grayson Barber

Frank L. Corrado
Rossi, Barry, Corrado & Grassi
2700 Pacific Avenue
Wildwood, New Jersey 08260
(609) 729-1333

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4, 5, 6, 28, 29, 30

INTRODUCTION

This case is about censorship and self-censorship. At its heart is the private Defendants' assertion of the right to threaten professors, graduate students, and other researchers with litigation in order to prevent them from publishing scientific papers. This unprecedented threat to scientific freedom is based on a 1998 federal statute, the Digital Millennium Copyright Act ("DMCA"), whose "anti-dissemination" provisions prohibit "providing" technology that could be used to "circumvent technological measures" placed on digital copyrighted works.

The private Defendants' position is simple: publishing scientific papers that describe or explain weaknesses in copyright owners' information security techniques "provides" unlawful technology. Researchers must censor themselves, clear their papers with the private Defendants, or risk litigation.

This may sound like hyperbole. Surely, no scientist need face that choice so long as the First Amendment secures "the larger public interest . . . in the dissemination of truth." Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (footnote omitted). But it has already happened. In April 2001, the private Defendants threatened researchers from two major U.S. universities and a private company with a lawsuit if they presented their work at a scientific conference, the 2001 Information Hiding Workshop ("IHW"). The researchers, their institutions and IHW were told that the paper must either be drastically changed or they would all face litigation. Many hours were spent addressing the threat. The researchers eventually withdrew the paper from IHW.

The researchers did not give up, however; they submitted an improved version ("the SDMI Paper") to another conference, and it was accepted. Now they seek judicial clarification of their right to publish their work without fear of being sued. This Court must decide whether they and their colleagues may speak, or whether Defendants may coerce their silence with threats

of litigation. At stake is a fundamental freedom for any free society: The freedom of scientists and researchers to investigate and to share their findings with the world.

The private Defendants, of course, seek to dismiss this case. In response to this lawsuit, they have told this Court that they will not sue over the SDMI Paper and two others identified in the complaint. Based on these limited, one-time assurances, given to the researchers only after this litigation began, they claim that the threat is over.

What the private Defendants fail to recognize is that “[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.” Thornhill v. Alabama, 310 U.S. 88, 97 (1940). The First Amendment condemns not only individual acts of censorship, but ongoing censorship schemes and self-censorship caused by vague and overbroad laws. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 756-758 (1988); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69-71 (1963). For this reason alone, this case cannot be dismissed.

Nor is the threat over. Defendants’ agreement not to sue Plaintiffs over these three papers excludes any substantive revisions. Defendants reserved the ability to threaten Plaintiffs’ other work, including several current projects and a pending book deal. Scott Craver, a Ph.D. student, is conducting dissertation research on digital watermarking. Prof. Min Wu and her thesis advisor, Prof. Bede Liu, are in final negotiations over a book contract to publish a revised version of her dissertation, part of which falls squarely within the April threat. Some of the Plaintiffs’ careers have been devoted to fields related to the topic of the conference paper -- the assessment of technologies used to control digital works -- and they wish to continue their work. Having once been threatened, they would be fools to think that it cannot happen again.

Using the DMCA to threaten the Plaintiffs, the Defendants have chilled the fields of information and multimedia security. One professor has said “Before the SDMI incident, I

would never have imagined that a scientific research paper would run afoul of the DMCA.”

Appel Decl. ¶19. And while the Justice Department has remained silent in this case, it has been active elsewhere: on July 16, the FBI arrested a Russian programmer attending a conference in Nevada for allegedly violating one of the DMCA provisions challenged here.

The scientific community is now being forced to address the threat posed by DMCA on a regular, continuing basis. IHW, the conference where this controversy started, will be held in Europe next year because of DMCA concerns. Reiter Decl. ¶10. Plaintiff USENIX’s fear that DMCA-based threats will hurt its conferences, Young Decl. ¶¶36-40, was confirmed when a renowned foreign software engineer recently resigned from a USENIX program committee because of “the DMCA mess.” Cox Decl. ¶ 7. Declarant Association of Computing Machinery (ACM) will hold a workshop on digital rights management (“DRM”) in November. ACM and the workshop committee are also concerned about DMCA. ACM Decl. ¶¶15-25; Reiter Decl. ¶¶11-13. Their fears, too, have been confirmed. Citing DMCA concerns, a foreign researcher chose not to submit a paper to the workshop. Ferguson Decl. ¶8. A security and privacy conference of the Institute of Electrical and Electronics Engineers is to be held next May; the conference organizers are already discussing how they should react to the submission of a paper that might be construed as violating the DMCA. Reiter Decl. ¶15-17.

The issue in this case is an old one. As long as the Defendants reserve the role of scientific censor, like Renaissance authorities stifling these modern Galileos, and using a federal statute as justification, there exists a justiciable “case or controversy.” The facts of this case highlight in stark detail how scientific freedom of expression is being distorted by the Defendants’ actions under DMCA. Cases far less concrete have been found justiciable. Bantam Books, Inc., 372 U.S. at 65 (“It is characteristic of the freedoms of expression in general that

they are vulnerable to gravely damaging yet barely visible encroachments”). Defendants’ Motion to Dismiss must be denied.

STATEMENT OF FACTS

A. The Digital Millennium Copyright Act

The DMCA makes it unlawful to disseminate “technology” that can be used to circumvent copyright owners’ technical protection measures. 17 U.S.C. §§ 1201(a)(2), 1201(b). Acts of copyright infringement have always been illegal under standard copyright law; the DMCA goes further, to prohibit acts of “circumvention.” §1201(a)(1)(A). The DMCA also contains prohibitions on creating and making available technologies that can be used to circumvent “access controls”: one may not “offer to the public, provide or otherwise traffic in any technology . . . or part thereof” that is primarily designed or produced for the purpose of circumvention; lacks commercial significance other than for circumvention; or is marketed for circumvention. §1201(a)(2)(A), (B), (C). To “‘circumvent a technological measure’ 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.” §1201(a)(3)(A).

Similarly, the DMCA supplements standard copyright infringement law by making it unlawful to offer to the public, provide or otherwise traffic in technologies that circumvent technological measures that “effectively protect a right of a copyright owner,” using the same three disjunctive elements of design, commercial significance, and marketing intent. §§1201(b)(1)(A),(B),(C). To “‘circumvent protection afforded by a technological measure’ means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure.” §1201(b)(2)(A).

In April 2001, the private Defendants asserted that publication of Plaintiffs' scientific research papers was covered under the DMCA because the papers described weaknesses of or explained attacks on technologies used to limit access to, and reproduction of, digital copyrighted works. See Exhibit C to the complaint. On this view, publication of such research would be unlawful.

But computer systems research has long been driven by close analysis of existing systems and approaches, in order to understand what works well and what does not. "It is critical that the researchers and engineers developing new systems be able to study existing ones for advantages and flaws." Lazowska Decl. ¶6. "Analysis is no less important when the system being studied is used to protect copyrighted works. Indeed, because the same basic elements used in copyright and access protection systems may be used in systems to protect the privacy of personal communications, confidentiality of business data, or security of financial transactions, there is no bright line between study of systems with different practical applications." Ibid.

Under the DMCA, a researcher need not know that a particular encryption or security technique is even being used to protect copyrighted works. Nor does it matter how many copyrighted works use that protection measure. If, unknown to a researcher, a single copyrighted work uses a security technique as a technical protection measure, the researcher's publication of work that explains how to defeat or weaken that security technique would expose him or her to DMCA liability.

The DMCA has severe civil and criminal penalties. The statute allows "any person injured" by a violation of §1201 or §1202 to sue for an injunction and either seek actual damages and profits or statutory damages. §1203(b). Criminal liability of up to \$500,000 and imprisonment for up to five years may be imposed for first offenses, which must be willful and

for purposes of commercial advantage. §1204(a)(1); §1204(a)(2) (doubling penalties for second offenses).

B. The SDMI Public Challenge

The Plaintiffs became involved with the private Defendants when defendant SDMI issued a public challenge inviting all comers to break several digital watermarks as well as other technologies that can control digital music (the “Challenge”). Felten Decl. ¶¶ 24-25. The Challenge was a form of “malicious attack testing,” *id.* ¶24, which is normal and advisable in the field of information security. Dean Decl. ¶¶3-4; Wallach Decl. ¶7; Appel Decl. ¶¶11-14; Blaze Decl. ¶¶11-12.

The terms of the Challenge, set forth in a “Click-Through Agreement,” were fairly simple. See complaint Exhibit B. Permission was granted to attack the provided music clips during a three-week public Challenge period. Felten Decl. ¶ 26. Successful challengers were eligible for prize money on the condition that they enter into a second agreement in which they assigned to defendant SDMI their intellectual property rights in their work under the Challenge and agreed not to disclose “any information about the details of the attack to any other party.” *Id.* ¶31. The Plaintiffs refused the money and did not enter into any other agreement. *Ibid.*

A few days after the Challenge was issued, Prof. Felten began to build a team to participate in it. The team eventually consisted of the individual Plaintiffs in this action.¹ Felten Decl. ¶¶35-37. The author-plaintiffs were uninterested in the prize money and intended to publish their research as a case study in attacking these technologies. Wallach Decl. ¶11; Dean Decl. ¶10; Felten Decl. ¶ 33. Prof. Felten believed that the Challenge was of scientific interest. Felten Decl. ¶ 33. He also believed that if the Challenge technologies were weak, the public

¹Each of the individual plaintiffs is an author of the SDMI Paper. One other author chose

should be informed. *Id.* ¶¶101-04. Prof. Wallach believed that the Challenge technologies were not likely to be secure against attack and that the Challenge presented an excellent opportunity to demonstrate that they were “not good science.” Wallach Decl. ¶¶ 6-7.

C. The Information Hiding Workshop

The authors decided to submit a paper describing their results to the Fourth International IHW conference, held in Pittsburgh on April 25-29, 2001. IHW provides a forum for professionals and researchers to discuss a variety of non-cryptographic approaches to hiding or disguising information, including copyright marking of digital objects and detecting hidden information. McHugh Decl. ¶1. The paper they submitted to IHW (“IHW Paper”) was an early version of the SDMI Paper² filed under seal as Exhibit D to the complaint.

While the IHW Paper was being written, Joseph M. Winograd, the Executive Vice President and Chief Technology Officer of Defendant Verance, contacted Prof. Felten and stated that Verance was the proponent of one of the watermark technologies in the Challenge. Felten Decl. ¶56. Prof. Felten and Dr. Winograd communicated intermittently, and Prof. Felten offered to provide Dr. Winograd with a pre-publication copy of the IHW Paper after it had been refined.

Around early December 2000, the authors submitted the IHW Paper to IHW. They learned in February 2001 that the paper had been accepted with glowing reviews—one reviewer described it as a “tour de force.” Felten Decl. ¶51. In accordance with the reviewers’ comments, the authors made additional revisions. *Id.* ¶52. The IHW Paper was scheduled to be presented on April 26, 2001, and to be published in the conference proceedings. *Id.* ¶ 54.

not to participate in this litigation.

² The SDMI paper must be distinguished from the IHW paper, which was filed under seal as Exhibit D to the complaint. Defendants’ opening brief obscures the distinction by referring to both as the “Felten paper.” Since the paper was authored by nine individuals, plaintiffs will continue to refer to it as the “SDMI paper.”

D. The Threats

In late March 2001, Prof. Felten gave a copy of the IHW Paper to Dr. Winograd. Felten Decl. ¶58. On April 6, 2001, Dr. Winograd expressed concern and asked to discuss how it might be changed. Dr. Winograd said the paper “provides unnecessarily detailed information . . . obtained through analysis of the samples provided by SDMI” and questioned whether “the inclusion of these specific numeric details either advances your stated goals of furthering the academic body of knowledge regarding security technologies or any other cause, other than facilitating the use of your results by others seeking to circumvent the legitimate use of these technologies for copyright protection purposes.” Am. complaint ¶ 41. He urged Prof. Felten to “reconsider” the decision to include this information in the IHW Paper. *Ibid.* Dr. Winograd also told Prof. Felten that he had “alert[ed]” defendant SDMI about the paper’s contents as a “precautionary step.” Felten Decl. ¶ 59.

On April 9, three days later, Prof. Felten received a letter from Mr. Matthew Oppenheim, Esq., of defendant SDMI, written on the letterhead of defendant RIAA. See Exhibit C to the complaint. The letter referred specifically to defendant Verance and warned that presentation and publication of the paper at IHW might violate both DMCA and the terms of the Click-Through agreement. The letter was copied to several other individuals, including the program chair of IHW (Dr. Ira Moskowitz of the U.S. Naval Research Laboratory and the general counsel of Princeton University (Howard Ende).

Not surprisingly, copies of the letter rapidly circulated among the authors and others. Dr. Moskowitz sent a copy to the general chair of IHW, Dr. John McHugh of Carnegie-Mellon University. McHugh Decl. ¶ 5. Prof. Wallach gave a copy to Rice University general counsel Richard Zansitis and associate general counsel Carlos Garcia. Zansitis Decl. ¶ 2.

In light of Dr. Winograd's earlier statements about the IHW Paper, Prof. Felten and the other authors viewed the letter as a serious threat of legal action, as did the IHW general chair and Xerox PARC. Felten Decl. ¶¶61-62, 73; Wallach Decl. ¶¶19,23; Dean Decl. ¶18 ("Xerox, my own employer . . . was making it increasingly clear that they did not want us to go forward with the [IHW Paper] . . . because they were concerned that they might become embroiled in a lawsuit."); McHugh Decl. ¶4. The general counsels of both Princeton University and Rice University took the letter equally seriously. Ende Decl. ¶6 ("I viewed Mr. Oppenheim's letter as a warning of legal action"); Zansitis Decl. ¶6 ("I believed that Mr. Oppenheim's letter threatened legal action against the Rice co-authors, and possibly Rice University as well.").

Beginning on or around April 11, two days after Prof. Felten received the threat letter, an extended series of conversations and discussions took place in an attempt to address the threat. Felten Decl. ¶62; Ende Decl. ¶¶ 5-6. These discussions consumed a tremendous amount of resources. Ende Decl. ¶4 ("I devoted hours upon hours to the matter"), ¶6 ("[i]ntense daily (and sometimes hourly) consultations commenced"); Zansitis Decl. ¶4 ("Mr. Garcia and I devoted many hours on the matter, and, in anticipation of litigation, retained outside counsel").

The discussions proceeded along two parallel tracks, legal and technical. On April 13, Mr. Ende sent a letter to Mr. Oppenheim seeking clarification of the legal issues, but received no reply. Ende Decl. ¶7, Exh. 2 to Felten Decl. In addition to many e-mail exchanges and phone calls between individuals, Prof. Felten, representatives of Princeton and Rice, and representatives of Defendants engaged in two long conference calls on April 20 and April 23. *Id.* ¶¶ 10-18; Zansitis Decl. ¶ 9-17.

During these conference calls, Defendants' representatives clarified their positions. In the April 20 call, Dr. Winograd said he thought the IHW Paper was written in part to circumvent Verance's technology. Zansitis Decl. ¶11. Mr. Oppenheim spoke of defendant SDMI's concern

that the IHW Paper would cause economic harm. Id. ¶ 9. In the April 23 call, Mr. Bruce Turnbull, lead outside counsel for Verance, stated that the IHW Paper violated DMCA provisions relating to technologies that could circumvent copyright controls and to the removal of copyright management information. Id. ¶ 15. Mr. Turnbull said that the description of a technology in an academic paper could itself be a “technology” within the meaning of DMCA. Ibid. David Leibowitz, Verance’s chairman of the board and a lawyer, said that in his opinion the submission of the IHW Paper to IHW itself violated the law. Id. ¶16. No resolution of the controversy resulted from any of these discussions.

In the meantime, Prof. Felten and Dr. Winograd discussed how the IHW Paper might be revised to address Verance’s technical concerns. On April 17, Prof. Felten asked Dr. Winograd for clarifications, and received a long list of recommended changes to the IHW Paper. Ende Decl. ¶9; Felten Decl. Exh. 3 and ¶69. They continued this discussion up until April 26. Felten Decl. ¶ 66. This discussion also proved fruitless.

While the authors and their institutions were conducting these discussions, IHW itself was also caught up in the controversy. On April 19, Dr. Moskowitz, the IHW program chair, unilaterally changed the date of the IHW Paper presentation and required that all interested parties, including SDMI and RIAA, certify to IHW that they would not object to the presentation. McHugh Decl. ¶6. Prof. Felten received a phone call that night from Dr. Moskowitz, who expressed great concern to him about the paper. Felten Decl. ¶75. On April 23, the Naval Research Laboratory, where Dr. Moskowitz worked, removed the IHW conference web pages from its web server. McHugh Decl. ¶8.

On April 24, however, Dr. McHugh and other members of the IHW organizing committee overruled Dr. Moskowitz’s decision, and declared that the paper could be presented. McHugh Decl. ¶¶6-7.

E. The Harm

Unfortunately, the damage had already been done. Based on all his conversations with Dr. Winograd and the private Defendants, Prof. Felten believed that legal action could only be averted if the IHW Paper were revised to be acceptable to Dr. Winograd. Felten Decl. ¶67. Such a change would have “severely gutted” the paper and would have made it unacceptable to a forum like IHW. *Id.* ¶¶71-72 (“I would be embarrassed to submit such a paper to any respectable conference or journal”).

At the same time, the authors were very concerned about being sued. Felten Decl. ¶73; Wallach Decl. ¶19 (“the co-authors grew seriously concerned over their exposure to liability of an unknown and potentially frightening size”); ¶23 (“I do not have the personal resources to defend myself against a lawsuit such as was threatened by RIAA”). Prof. Felten did not know whether Princeton would indemnify or defend him if he were sued. Felten Decl. ¶68. Dr. Dean knew that his employer wouldn’t. Dean Decl. ¶19 (“we could not afford the risk of a costly lawsuit. I knew that Xerox would not back me in the event of a suit, and I did not have the resources to pay an attorney to defend me in potentially protracted litigation”).

The authors were also concerned that publication would subject both IHW and their institutions to liability. Felten Decl ¶80; Wallach Decl. ¶23. Given the pace of events and the seriousness of the threats, the authors decided to withdraw the IHW Paper. Felten Decl. ¶80; Wallach Decl. ¶ 19; Dean Decl. ¶ 19. Shortly after this decision was made public, defendants RIAA and SDMI issued a joint press release saying they had not threatened the researchers. Hardy Decl. Exhibit B. Verance issued no such statement, and none of the private Defendants communicated this or any other message directly to the researchers.

Two other papers on the SDMI Challenge, both written before the April 9 threat letter, were also affected. First, plaintiff Min Wu's paper, "Analysis of Attacks on SDMI Audio Watermarks," was submitted to and accepted for publication and presentation by the IEEE Signal Processing Society 26th International Conference on Acoustics, Speech and Signal Processing ("ICASSP") held in Salt Lake City on May 7-11, 2001. (Filed under seal as Exhibit E to the complaint.) After the authors decided to withdraw the IHW Paper, Dr. Wu became concerned that the ICASSP Paper might subject her to liability. Her advisor, plaintiff Bede Liu sought to have it removed from the conference proceedings, but it was too late. (Liu Decl. ¶ 20.)

Second, Dr. Wu posted her dissertation, "Multimedia Data Hiding," on her website in early May 2001, including in Chapter 10 a discussion of the work she did on the public Challenge. Wu Decl. ¶ 2; Exhibit F filed under seal with the complaint.) She later realized that any discussion of work done during the Challenge might trigger legal liability, and removed Chapter 10 from her website on May 17, 2001. *Id.* ¶ 3.

Despite being forced to withdraw the IHW Paper, the authors did not give up. Dean Decl. ¶ 21. They improved the IHW Paper into its present form (the "SDMI Paper" filed under seal as Exhibit D to the complaint) and on May 11 submitted it to the USENIX Security Symposium, to be held in August 13-17, 2001. Felten Decl. ¶¶ 82, 85. Although the submission deadline had passed, USENIX agreed to give the paper expedited reviewing, given the unusual circumstances. Felten Decl. ¶ 84; Young Decl. ¶¶ 20-21. USENIX used an expedited but otherwise standard review procedure. Young Decl. ¶¶ 21-22. The conference accepted the best 25 papers submitted, and the SDMI Paper was ranked seventh. *Id.* ¶ 22.

Frightened by the controversy at IHW, USENIX had concerns about the legal ramifications of accepting the SDMI Paper. Young Decl. ¶ 24. USENIX counsel said it might be the target of legal threats. *Id.* ¶ 25-26. Because USENIX receives the bulk of its revenues from

its conferences, and people attend its conferences because of the papers it publishes, USENIX risked criminal liability under DMCA. *Id.* ¶ 27. Until the private Defendants represented to this Court that they would not sue, USENIX was prepared to remove the paper from the conference agenda unless its concerns were resolved. *Id.* ¶ 30.

F. Subsequent Negotiations

In the weeks after filing this case, Plaintiffs tried to negotiate with the Defendants in an effort to alleviate the chilling effects of the April threats, but with only limited success. Defendants did agree that they would not institute litigation over the three papers. But they did not remove the sword of Damocles hanging over the Plaintiffs.

First, the Defendants' express representation as to the three papers filed under seal with the complaint was limited only to the papers translated into foreign languages or with unsubstantial grammatical changes. Hardy Decl. Ex. K. Defendants expressly refused to recant their threat as to future works directly related to these three papers. For instance, Defendants refused to address "academic papers not yet written," Hardy Decl. Ex. E, even though Prof. Wu had been approached by an academic publisher about publishing a book based on her dissertation.

Second, defendant Verance continued to insist that academic researchers "minimize the potential impact of their scientific results on the security of commercially fielded systems and the industries that rely on these systems" and take steps to "substantial[ly] cooperat[e] with the affected commercial companies." *Id.* Indeed, Verance went out of its way to question Plaintiffs' motives in publishing the SDMI Paper. *Id.* These statements by Verance imply that academic security researchers must consult with commercial companies before they publish their work -- or else.

Third, Plaintiffs have had no success in obtaining reassurances from defendant the U.S. Justice Department. The government has elsewhere indicated its willingness to enforce the criminal provisions of the DMCA. On July 16, 2001, a Russian programmer, Dmitry Sklyarov, was arrested by the FBI for violating the DMCA. U.S v. Dmitry Sklyarov, N.D.Ca, Case Number 5 01 257; see also *New York Times* Aug. 11, 2001, at C1; press release of U.S. Attorney's Office for Northern District of California) criminal complaint.³

USENIX has long been concerned that the Defendants' threats last April would discourage foreign researchers from attending or participating in its U.S.-based academic conferences. Young Decl. ¶40. With Mr. Sklyarov's arrest, that concern has become reality. In consequence, a renowned European software engineer resigned from the organizing committee of an upcoming USENIX conference, citing the DMCA. Cox Decl. ¶7.

G. Effects on Others

The DMCA has become a persistent threat to researchers, sponsors of other security conferences, and other members of the computer science community. For instance, harm has inured to the Association for Computing Machinery ("ACM"), the largest professional society of computer scientists, educators, and other computer professionals, which regularly publishes, both on paper and electronically, papers and journals in many areas of computer science that contain computer code, mathematical equations, algorithms, and other means by which scientists communicate technical information. Id. ¶¶2, 5, 8-9.

Like USENIX, ACM sponsors conferences. Its upcoming Workshop on Security and Privacy in Digital Rights Management, scheduled for November 5, 2001, poses an even greater threat of DMCA-based liability. Id. ¶¶ 6, 18-21. In particular, ACM is concerned that

³ http://www.usdoj.gov/usao/can/press/html/2001_07_17_sklyarov.html (visited 8/13/01)

presentation and publication of technical papers on “access control mechanisms, architectures for Digital Rights Management (DRM) systems, broadcast encryption, electronic commerce protocols, encryption and authentication for multimedia data, key management in DRM systems, portability of digital rights, privacy and anonymity, privacy-preserving data mining, robust identification of digital content, tamper resistant hardware and consumer devices, threat and vulnerability assessment, and watermarking and fingerprinting for media software” is “potentially restricted by the DMCA.” Id. ¶ 20.

Unsurprisingly, ACM feels the chilling effects of the DMCA for the November 2001 DRM workshop. Members of the DRM workshop committee are concerned about both the liability of paper authors and of conference organizers for accepting papers that could violate the DMCA. Reiter Decl. ¶12. One foreign researcher, Niels Ferguson, told the workshop organizers that he had “recently completed a paper containing a practical attack on [a] content-protection system . . . I think this paper would be a perfect match for your conference. There is just one problem: the DMCA.” Reiter Decl. ¶14. He eventually decided not to submit the paper, informing ACM organizers of his concern that presenting and publishing their technical papers would expose him to DMCA-based litigation. Ferguson Decl. ¶8. Reiter Decl. ¶14. As of August 3, the organizers believe that two other paper submissions may raise DMCA concerns. Id.

Similarly, the IEEE Technical Committee on Security and Privacy, which will sponsor the IEEE Symposium on Security and Privacy in May 2002, has been chilled. Reiter Dec. ¶15. The organizers are already discussing “the ramifications of the DMCA” and “the question of how to react to the submission of a paper that might be construed as violating the DMCA,” citing this case and the Sklyarov arrest. Id. ¶ 16.

The DMCA serves copyright holders by vastly expanding protection for their intellectual property. Its service as an instrument of intimidation, and the government's willingness to enforce it at the behest of private companies, seriously threaten scientific and technical innovation in the United States.

ARGUMENT

Cloaking themselves with authority under the DMCA to pass on the legal legitimacy of academic publications, scientific conferences, and doctoral dissertations, the private Defendants have created a controversy that amply satisfies the requirements of Article III of the Constitution. They have withdrawn their threats as to the three papers filed under seal with the complaint, and now ask the Court to ignore the harm they have already caused, their express refusal to disavow future litigation, and the academic and professional limbo their threats have created for the Plaintiffs. The conflict between the parties before this Court is concrete and urgent, meriting both declaratory and injunctive relief.

Defendants' argument amounts to this: A multi-billion dollar industry may use a federal statute to threaten to sue researchers and their universities over an academic research paper, force them to withdraw the paper from a scientific conference, promise not to sue over a second attempt at publication after a case is filed against them, retain their right to sue the Plaintiffs at any time over other papers concerning the same research under the same statute, and yet claim there is no sufficient immediacy or adversity of interests to warrant federal court intervention. According to SDMI, “[i]f and when Plaintiffs are ever confronted with a live controversy as opposed to a hypothetical one, the courthouse will still be open to them.”⁴ SDMI Br. at 2.

Plaintiffs want to research and publish in areas subject to the DMCA without having to censor themselves or face the threat of civil or criminal sanctions. Defendants want to suppress publication in the same areas, fearing that the copyright protection measures they use or plan to use will be criticized. The Defendants have already threatened the individual Plaintiffs, and have

⁴ Verance apparently concedes that a live controversy once existed: “If and when Plaintiffs are ever again confronted with a live controversy, as opposed to a hypothetical one, they will be able to commence an action.” (Verance Br. at 4 (emphasis added).)

expressly reserved their right under the DMCA to threaten and sue the Plaintiffs in the future, even for revisions to the three papers filed under seal unless the revisions are limited to “immaterial, grammatical changes.” RIAA Br. at 12 n.6.

Defendants’ position is untenable. There is no requirement that plaintiffs in First Amendment cases actually be threatened before they may challenge the constitutionality of a statute, so long as they “have alleged an actual and well-founded fear that the law will be enforced against them.” Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988). Accordingly, no jurisdictional or prudential barriers impair this Court’s authority to grant declaratory and injunctive relief in this case.

I. PLAINTIFFS HAVE STANDING TO PURSUE CLAIMS BASED ON CURRENT AND FUTURE HARM

Deigning to permit the Plaintiffs to publish the three papers filed under seal with the complaint, and dismissing Plaintiffs’ future work as “hypothetical,” the private Defendants ask this Court to disregard the harm their threats and the DMCA continue to visit upon the Plaintiffs. A number of the Plaintiffs are now either engaged in projects directly related to the SDMI Challenge or have, as a result of the Defendants’ threats, decided to forego projects that would again place them at odds with the Defendants. This fear—based upon the past threats and Defendants’ refusal to remove those threats as to current and future works— is reasonable and by itself sufficient to confer standing under Article III.

The doctrine of standing focuses on whether the plaintiff “is a proper party to request adjudication of a particular issue.” Flast v. Cohen, 392 U.S. 83, 99-100 (1968). To establish standing under Article III, a plaintiff must “show that he personally has suffered some actual or

threatened injury” fairly traceable to the conduct of the defendant that can be redressed by a favorable court decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). These three requirements, injury-in-fact, causation and redressability, constitute the “irreducible constitutional minimum of standing.” Lujan, 504 U.S. at 560.

Although a plaintiff must establish each of the three elements, “courts have been expansive in their view of a litigant’s standing to bring legal action in situations in which free speech rights are implicated.” Ruocchio v. United Transp. Union, Local 60, 181 F.3d 376, 385 (3d Cir. 1999), cert. denied, 528 U.S. 1154 (2000). This is particularly true where there is a risk of self-censorship. ACLU v. Miller, 977 F.Supp. 1228, 1231 (N.D. Ga. 1997) (“the rules of standing are relaxed in the First Amendment context where ‘the statute’s alleged danger is in large measure one of self-censorship; a harm that can be realized without an actual prosecution.’” (quoting American Booksellers, 484 U.S. at 384)); Waters v. Barry, 711 F.Supp 1125, 1129 (D.C.D.C. 1989) (“When First Amendment concerns are raised, the danger that ‘law abiding’ behavior will result in self-censorship serves to heighten Article III’s sympathy toward preenforcement challenges.”). Because self-censorship has already occurred here and because the risk are still present, Plaintiffs have fully established their standing to litigate this case.

A. Plaintiffs Currently Suffer and Will Continue to Suffer Injury in Fact

Plaintiffs allege that because of the DMCA and the Defendants’ threats they have censored themselves and are chilled from engaging in research, collaborating with other scientists, publishing, and discussing their work. They fear being sued in the future if they continue their research and publish results regarding the technologies that were involved in the SDMI public Challenge. The Plaintiffs reasonably fear not only damage to their professional

careers, but also the financial costs of having to defend themselves in litigation. See, e.g., Wu Decl. ¶17, Dean Decl. ¶23, Wallach Dec. ¶23.

These injuries are cognizable for purposes of standing if the Plaintiffs can show that their fears are “well founded,” see American Booksellers, 484 U.S. at 393, or, in other words, if there exists a “credible threat of prosecution” or enforcement. See Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979). As long as “the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution,” the plaintiff has alleged a sufficient injury for purposes of Article III. Id. In fact, the existence of a credible threat of prosecution or enforcement is itself a cognizable injury. New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir.1996) (“credible threat of present or future prosecution itself works an injury that is sufficient for standing”); Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 131 (8th Cir. 1997) (same).

“The standard—encapsulated in the phrase ‘credible threat of prosecution’— is quite forgiving.” ACLU v. Reno, 31 F.Supp2d. 473, 479 (E.D. Pa. 1999) (quoting New Hampshire Right to Life, 99 F.3d at 14), aff’d by, 217 F.3d 162 (3d Cir. 2000), cert. granted sub nom., Ashcroft v. ACLU, 121 S.Ct. 1997 (2001). Particularly in First Amendment cases, a credible threat can exist even if no actual threat has been made. For instance, in ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999), the plaintiffs challenged a statute prohibiting the dissemination by computer of material harmful to minors. Holding that the plaintiffs had standing, the court rejected the defendants’ argument that the plaintiffs could not challenge statute because the suit was brought before statute went into effect and plaintiffs had “not received a real and concrete threat of prosecution.” Id. at 1154; see also LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155-56 (9th Cir. 2000) (noting that “the tendency to find standing absent actual, impending enforcement against

the plaintiff is stronger in First Amendment cases”). Thus, in challenges to both criminal and civil statutes on First Amendment grounds, a credible threat of prosecution is established if the plaintiff can “demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.” Babbitt, 442 U.S. at 298; Bland v. Fessler, 88 F.3d 729, 736 (9th Cir.) (quoting Babbitt and applying the standard in challenge to a civil statute), cert. denied, 519 U.S. 1009 (1996).

Ultimately, the credible threat standard turns on the “objective reasonableness” of the plaintiff’s fear that the statute will be enforced against him. Rhode Island Assoc. of Realtors v. Whitehouse, 199 F.3d 26, 31 (1st Cir. 1999). In determining whether a plaintiff’s fear is reasonable, a court will look to the “totality of circumstances.” See Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 699 (3d Cir. 1996). As stated by the First Circuit,

Determining objective reasonableness demands a frank consideration of the totality of the circumstances, including the nature of the conduct that a particular statute proscribesOur search for an answer takes place against a background understanding that when First Amendment values are at risk, court must be especially sensitive to the danger of self-censorship.

Whitehouse, 199 F.3d at 31 (citations omitted).

The factors to consider include the “nature of the conduct,” “past instances of enforcement” and failure on the part of the defendant “to disavow application of the challenged provisions.” LSO, Ltd., 205 F.3d at 1155. Here, given the threats of April 2001, the private Defendants’ express reservation of their right to threaten or sue in the future, and the criminal action brought under the DMCA in the Sklyarov case, Plaintiffs have established a credible threat of prosecution.

1. Defendants’ Past Threats Have Created a Credible Threat of Prosecution.

Defendants would have this Court believe that they never intended to file suit against the Plaintiffs over the IHW paper. Defendants argue that their letters and calls⁵ were merely intended to “catalyze a dialogue” between the Plaintiffs and Defendants, RIAA Br. at 7, and belittle the responses as “vaporous imaginings and chimerical fears.” *Id.* at 1.

But the private Defendants did threaten litigation if the authors presented their paper at the IHW conference. There was no unintended mistake or misunderstanding. In fact, the Defendants achieved exactly the objective set forth in the April 9, 2001, letter, which was sent not only to Prof. Felten, but to the IHW program chair, General Counsel of Princeton University, the head of the computer science department at Princeton and the Commanding Officer of the Naval Research Laboratory — to have Prof. Felten “withdraw the paper . . . , assure that is removed from the Workshop distribution materials and destroyed, and avoid a public discussion of confidential information.” Exhibit C to the complaint.

The authors and their employers responded reasonably to the seriousness of the threats. Rice University retained outside counsel. Zansitis Decl. ¶4. The general counsels of Rice and Princeton read the letter as a threat and formed the clear impression, following discussions with Verance’s chairman and its outside counsel, that the company would take whatever legal steps were necessary to protect its interests. *Id.* ¶¶6, 16.; Ende Decl. ¶¶7, 17. The authors censored themselves by withdrawing the IHW Paper from the conference. Prof. Wu censored herself by removing Chapter 10 of her dissertation from her website after speaking to a Princeton University lawyer who told her that it would be “risky” to leave it posted. Wu Decl. ¶3. Prof. Liu, tried to withdraw the ICASSP Paper from the conference. Liu Decl. ¶21.

⁵ Defendants’ submission contains no certifications from any of the principals involved in the events of April 2001, and the press releases to which they refer contain only hearsay.

Defendants point to a press release SDMI issued after Plaintiffs pulled paper from the IHW conference, in which SDMI stated that it “does not – nor did it ever – intend to bring any legal action against Professor Felten or his co-authors.”⁶ RIAA Br. at 8; Hardy Decl. Ex. B. But the press release was issued *after* Prof. Felten and the other authors decided to withdraw the IHW paper. *See* Felten Decl. ¶83; Dean Decl. ¶20. Having used the threat of litigation to obtain exactly what they wanted – the withdrawal of the paper – they retroactively disavowed any intent to sue. If the Defendants never opposed publication, they never said so during the extensive negotiations. Their disavowal in a press release is not competent evidence; the Defendants made no direct statement to the authors or their institutions. The press release was merely the first in a line of self-serving statements made after the suppression of the IHW paper which were completely at odds with the Defendants’ statements and behavior prior to the IHW conference.

Remarkably, RIAA’s General Counsel then wrote a letter to the editor of *Industry Standard* stating that RIAA and SDMI “felt that Felten should publish his findings, because everyone benefits from research into the vulnerabilities of security measures.” RIAA Br. at 9-10; Hardy Decl. Ex. A.⁷ This belated press statement can hardly be taken seriously. Again, RIAA and SDMI had ample opportunity to retract the April 9, 2001, letter before the IHW paper was withdrawn, or to write to the researchers to prevent any continuing confusion about the paper or future works after the conference. Prior to the start of this litigation, however, no defendant ever sent a letter or statement to Prof. Felten, the other authors, or the general counsels of Princeton and Rice. Felten Decl. ¶84; Ende Decl. ¶19; Zansitis Decl. ¶18. Moreover, if this were in fact RIAA and SDMI’s position, they should have no objection to Prof. Felten’s or the other authors’ future work. But RIAA, SDMI and Verance have refused to represent that they will not sue Prof.

⁶ Verance has not pointed to any pre-filing statement disavowing an intention to sue.

⁷ The Sherman letter was published five days *after* this suit was filed. (*See id.*, Ex. A.)

Felten and his co-authors under the DMCA for any work other than the three specific papers filed under seal with the complaint.

RIAA and SDMI's belated public statements should be taken for what they were: statements to quell public criticism. Such self-serving statements after the fact should have no bearing on a plaintiff's standing now. The Supreme Court considered a similar situation in Bantam Books, 372 U.S. at 66-67, and rejected the claim of the defendant decency commission that its informal letters labeling films as obscene and recommending prosecution were merely informal warning letters "exhort[ing] booksellers and advis[ing] them of their legal rights."

By the time this action was filed, the individual Plaintiffs had already been threatened and had censored themselves. They received no direct retraction statements from the Defendants, and they remain under the threat of litigation for their work on the SDMI public Challenge.

2. Plaintiffs' Fears Are Reasonable in Light of Defendants' Refusal to Disavow Future Litigation and Their Commitment to Enforce the DMCA.

The Defendants' threats underscore their willingness to use the DMCA against scientists and researchers over the publication of scientific papers.⁸ Their refusal to stipulate or represent that they will not sue these Plaintiffs over their future work, including work directly related to the SDMI Challenge, leaves the Plaintiffs in the intolerable position of foregoing research and publication or risking another threat of a lawsuit from these Defendants.

Defendants claim that no such dilemma exists because they have stated that they will not sue over the three papers identified in the complaint, and Plaintiffs cannot point to any explicit threats from them concerning current or future work. See RIAA Br. at 23. Thus, according to

⁸ The prosecution of Dmitry Sklyarov demonstrates the government's commitment to enforce the criminal provisions of the DMCA.

the Defendants, Plaintiffs face no credible threat of prosecution and therefore cannot establish a cognizable injury for purposes of standing.

Defendants improperly ask the Court to disregard their threats of April 2001. Past threats of enforcement are evidence “bearing on whether there is a real and immediate threat of repeated injury.” O’Shea v. Littleton, 414 U.S. 488, 496 (1974), and may be sufficient, by themselves, to confer standing if accompanied by “continuing, present adverse effects,” *id.* at 495; *see e.g.* American-Arab Anti-discrimination Committee v. Thornburgh, 970 F.2d 501, 507 (9th Cir. 1992); United Food and Commercial Workers Int’l Union, AFL-CIO, CLC, v. IBP, Inc., 857 F.2d 422, 427 (8th Cir. 1988); Admiral Theatre v. City of Chicago, 832 F.Supp. 1195, 1201-02 (N.D. Ill. 1993); Brownsburg Area Patron Affecting Change v. Baldwin, 943 F.Supp. 975, 983 (S.D. Ind. 1996).

Here, the Defendants’ threats have created a continuing chilling effect on the Plaintiffs’ work as scientists and consequently on the exercise of their First Amendment rights.⁹ In fact, the Plaintiffs have a number of current projects that are neither “hypothetical” nor “speculative” and that come directly from of their research on the SDMI Challenge:

- Scott Craver is working on his dissertation project this summer which grew out of his work on the SDMI Challenge. Craver Decl. ¶ 19-22) His work would have general application, but he remains concerned about the legality of the research. *Id.* ¶¶ 23-24.
- Prof. Felten has been invited by *Scientific American* magazine to write an article on the SDMI Challenge. Felten Decl. ¶ 138. He would like to write the article, but will not do so unless the on-going controversy is resolved by the court or unless the Defendants grant him a blanket waiver. ¶ 139.

⁹ Courts are inclined to find a “personal stake in the outcome” of litigation and, therefore, standing where the challenged statute “interferes with the way the plaintiff would normally conduct his affairs.” Int’l Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 819 (5th Cir. 1979) Here, the restraint that the DMCA places on Plaintiffs’ ability to research and publish—which is what they normally do as scientists—goes hand in hand with the statute’s restraint on their First Amendment rights.

- Prof. Wu and her advisor, Prof. Bede Liu, have received a contract from a distinguished academic publisher, Springer-Verlag, to publish her dissertation as a book. Wu Decl. ¶18; Liu Decl. ¶24-25. Prof. Wu wants to include a chapter that will likely be substantially similar to Chapter 10 of her dissertation. Wu Decl. ¶ 19; Liu Decl. ¶ 25. Prof. Liu expects it will likely take a few months for him and Prof. Wu to complete a final manuscript once they sign a contract. During that time they will have to decide whether to include revisions to Chapter 10 in the book. They are not sure how to proceed. Ibid.
- Prof. Wu and Prof. Liu also want to conduct further research on the same or similar technologies that they evaluated during the SDMI Challenge, including technology A, which is believed to belong to Verance. Wu Decl. ¶ 20; Liu Decl. ¶ 26. They have specific plans for the research, but will forgo their plans as long as the threat posed by the Defendants under the DMCA still exists. Ibid.
- Prof. Wallach has been invited to write an article for IEEE on copyright management controls. He has specific plans for the paper,¹⁰ but will not begin writing it: "[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." Wallach Decl. ¶24.

These examples of indecision and self-censorship constitute concrete and imminent injuries, well within the contours of Article III standing. See, e.g., Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 465 (7th Cir.1998) (standing recognized in a challenge to a “partial birth” abortion statute where physicians who did not presently perform the procedure “would like the option to consider performing it should the condition of the patient so warrant”); accord Planned Parenthood of New Jersey v. Farmer, 220 F.3d 127, 148 (3d Cir. 2000) (finding ripe a challenge by physicians to abortion procedures they did not currently perform); see also, e.g., Animal Protection Institute v. Mosbacher, 799 F.Supp. 173, 177 (D.C.D.C. 1992) (standing granted to Plaintiffs who planned to watch whales “this summer” or in the summers of 1993 and 1994); NAACP Branches v. Maryland Dept. of State Police, 72 F.Supp.2d 560, 564-65

¹⁰ The paper would be a review of the history of copyright protection measures over the last thirty years and would include SDMI technologies. Wallach Decl. ¶24.

(D.Md.1999) (recognizing standing on behalf of African-American motorists to challenge allegedly racially discriminatory stops and searches of minority motorists traveling on I-95 in Maryland because they were likely to travel on I-95 in the future, the discriminatory conduct by the police officers could result from a “minor, perhaps unintentional traffic infraction,” and “they may be stopped even if no traffic violation has been committed.” Id. at 565.).

Fundamentally, Defendants misconstrue what is required to show a credible threat of prosecution. Plaintiffs are not required to point to *another* threat from the defendants. As noted, the standard of what constitutes a credible threat of prosecution “is quite forgiving.” ACLU, 31 F. Supp.2d at 479. The dispositive question is whether the Plaintiffs’ fears of litigation, which led them to withdraw the IHW paper and continue to censor themselves, are reasonable.

With respect to the Defendants’ representations to the Court and to counsel, it is important to note what exactly they have and have not said. They have agreed not to sue over the three papers attached to the complaint “in their current form,” and, apparently, subsequent or future versions as long as they contain only “immaterial, grammatical changes.” RIAA Br. at 11-12 & n.6. They have not agreed to forego litigation over any future publications, including revisions to Chapter 10, which Prof. Wu and Prof. Liu would like to include in their book. In fact, the Defendants have been very clear that they reserve the option of suing the Plaintiffs under the DMCA over any of these future works.¹¹ See RIAA Br. at 25 and Ex. D.

There is no question that the Defendants are committed to enforcing the DMCA. See RIAA Br. at 4-5, 26. RIAA represents over 400 recording companies that control the creation, production and/or distribution of approximately 90% of all legitimate sound recordings.

¹¹ At various points in its brief, RIAA states that discussion over current and future work are “simply not possible.” RIAA Br. at 12, 18. It also states that Plaintiffs have “conceded” this point by not addressing future works in the drafts of the proposed stipulation shared between the parties. Defendants know well that Plaintiffs do not make, and have never made, any such

Accordingly, RIAA has incredibly broad enforcement power under the DMCA.¹² Section 1203 of the DMCA allows any person injured by a violation of the substantive provisions of the DMCA (i.e., §§ 1201 or 1202) to bring a civil action against the violator. Because it represents companies that control nearly all of the digital music and sound recordings in the United States, RIAA can threaten suit under the DMCA over potentially any information disclosing weaknesses in any technological measure used to protect copyrighted music and sound recordings.

Given Defendants' prior threats, the lingering threats of future litigation, Defendants' invocation of the DMCA, and the widespread concern within the computer science community, the plaintiffs' fears are more than reasonable -- they are a sensible assessment of the situation. In considering the "totality of the circumstances" special attention should be paid to "the nature of the conduct that a particular statute proscribes." See Whitehouse, 199 F.3d at 31. If the statute "implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." LSO, Ltd., 205 F.3d at 1155.

3. The DMCA Targets the Speech of Scientists and Researchers, Creating a Chilling Effect on Science.

The Plaintiffs and the computer science community have no assurance that their research will withstand future legal challenges under the DMCA. Indeed, they cannot tell what research would be proscribed under the statute. Accordingly, this case presents a concrete and immediate controversy.

As noted, a relevant factor in determining injury in fact is "the nature of the conduct that a particular statute proscribes." Whitehouse, 199 F.3d at 31. The DMCA proscribes activity at

concession.

¹² RIAA "sent out more than 10,000 notices last year to universities and Web sites charging them with copyright violations." Ronna Abramson, "RIAA Not Shy About Playing Piracy Copy," *The Industry Standard* (May 9, 2001),

the core of the First Amendment, restraining publication and restricting the First Amendment rights of listeners as well. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (recognizing that the First Amendment protects listeners and the right to receive information); see also ACLU v. Reno, 31 F.Supp.2d at 481 n.2.

Where, as here, a statute threatens activity protected by the First Amendment, courts will presume that a credible threat of prosecution exists. “[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, the court will assume a credible threat of prosecution in the absence of compelling contrary evidence.” ACLU v. Reno, 31 F.Supp2d. at 480 (quoting New Hampshire Right to Life, 99 F.3d at 15).

The DMCA targets anyone who published information that can be used to circumvent copyright control measures, regardless of whether the person is a university scientist or not. The anti-dissemination provisions of § 1201 of the DMCA, for instance, expressly prohibit any person from “providing” or “offer[ing] to the public “ any technology . . . or part thereof” that is designed to circumvent access or copy control measures, or has little significant commercial use other than to circumvent such measures. See §§ 1201(a)(2)(A), (B) and (b)(1)(A), (B). These provisions, as the Defendants read them, apply to the publication and dissemination of scientific research. Arguably, their reading is consistent with the statute since information resulting from research may well be used to circumvent technological measures. The consequences for science, however, are devastating.

A number of scientists, many renowned experts in their fields, fear their work or the work of their colleagues will be subject to the DMCA. See Blaze Decl. ¶19; Schneier Decl. ¶¶21-22. Some of them have already been chilled. Lazowska Decl. ¶19; Blaze Decl. 21; Ferguson Decl.

<http://www.thestandard.com/article/0,1902,24356,00.html> (visited August 12, 2001).

¶8. Organizations are considering moving their conferences outside the United States to avoid potential liability under the DMCA. Blaze Decl. ¶18; ACM Decl. ¶22.; Young Decl. ¶39.

Foreign researchers are hesitant about coming to the United States for conferences. Ferguson Decl ¶9. Some have called for non-U.S. citizens to boycott conferences in the U.S. Cox. Decl. ¶7.

The DMCA empowers the government and private corporations to act as arbiters of what constitutes “acceptable” science and of what can and cannot be published or discussed. Much like the decency commission in Bantam Books, the private Defendants can demand prepublication review and clearance; indeed this is exactly what RIAA, SDMI and Verance demanded from plaintiffs in April and continue to demand with respect to the authors’ future works. Unlike the commission in Bantam Books, which could only recommend prosecution to the authorities, these Defendants have direct enforcement power through civil litigation. See New York Times, Inc. v. Sullivan, 376 U.S. 254, 277 (1964) (the threat of private litigation, with the potential for damages, can chill as easily and as much as the threat of criminal prosecution).

Adjudication is imperative; the DMCA must receive judicial review so that Plaintiffs and others will not have to continue running the risk of prosecution for each publication and research project they undertake.

B. Defendants’ Threats Were (and Are) the Cause of Plaintiffs’ Reasonable Fears

Defendants claim that the Plaintiffs cannot meet the causation requirement because any injury the Plaintiffs may have in the future cannot be traced back to the private Defendants. RIAA Br. 209 n.6. This objection can be disposed of quickly. The causation requirement “examines the causal connection between the assertedly unlawful conduct and the alleged injury. Allen v. Wright, 468 U.S. 737, 753 n.19 (1984). To satisfy the causation requirement, the

Plaintiffs must show that their injury is “fairly traceable” to the Defendant’s actions. Valley Forge, 454 U.S. at 472.

As set forth in the amended complaint, the Plaintiffs contemplate future research to evaluate technologies that were part of the SDMI public Challenge. There is no dispute that if their projects go forward, the parties will face essentially the same situation they faced in April 2001, when the private Defendants claimed that publication and discussion of the technologies would cause them economic harm. The Plaintiffs are afraid of being sued. See, e.g., Craver Decl. ¶14; Wallach Decl. ¶¶23-25; Wu Decl. ¶16. They and others have an ongoing concern about publishing in the area of information security because of the private Defendants’ past threats. See, e.g., Wu Decl. ¶20; Young Decl. ¶40; Ferguson Decl. ¶8; Craver Decl. ¶18.

There is also no dispute that the private Defendants have not waived their claimed right to sue over these current and future projects. Plaintiffs’ reasonable chill, current acts of self-censorship, and fear of future threats under the DMCA are all therefore directly traceable to the Defendants; they are based upon Defendants’ past threats and current express reservation of the right to sue over other scientific publication.

II. THERE IS MORE THAN SUFFICIENT ADVERSITY WITH RESPECT TO THE PAPERS IDENTIFIED IN THE COMPLAINT

Having rescinded their threats regarding the papers filed under seal with the complaint, Defendants now claim that there is no adversity of interests between the parties. Their argument is that, since they have represented that they will not sue over these papers, their interests are not adverse to the Plaintiffs’. RIAA Br. at 17. Their argument limits the question to whether declaratory relief would appropriate with respect to the three papers identified in the complaint.

Yet the chief case cited by the Defendants demonstrates that even if there is no adversity of interests over the three papers, the remainder of the case merits declaratory relief.¹³

The Third Circuit often applies the three-part test from Step-Saver Data Systems, Inc. v. Wyse Tech., 912 F.2d 643, 647 (3d Cir. 1990), to claims for declaratory relief in pre-enforcement actions. See, e.g., Pic-A-State Pa., Inc. v. Reno, 76 F.3d 1294, 1298 (3d Cir. 1996). The reason is that declaratory judgments are “typically sought before a completed injury has occurred.” Id. That is not true in this case; Plaintiffs were forced to censor themselves before the complaint was filed.

Therefore, the question with respect to declaratory relief here should be analyzed under the doctrine of mootness. At the time of the complaint, there was no question that Plaintiffs’ claim with respect to the SDMI paper, the ICASSP paper, and Chapter 10 satisfied all jurisdictional requirements. The reason a question of justiciability arises with respect to those papers now is only because of the Defendants’ voluntary change of tactics.¹⁴ Nonetheless, even if the dispute over the three papers is analyzed under Step-Saver, there remains sufficient adversity between the parties to justify a declaratory judgment.

Under the Step-Saver test, a plaintiff must demonstrate “the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that

¹³ Defendants erroneously assert that Plaintiffs’ request for injunctive relief is merely to enforce the declaratory judgments. See RIAA Br. at 14 n.7. Requests for declaratory and injunctive relief must be considered separately. See Zwickler v. Koota, 389 U.S. 241, 254-55 (1967) (holding that request for declaration that “statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute”).

¹⁴ Because the Plaintiffs had standing and there was sufficient adversity between the parties with respect to the three identified papers at the time of the complaint, the Defendants’ actions should be analyzed under the “voluntary cessation” exception to mootness. Under that standard, the Defendants bear a heavy burden of “making it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur.” United States v. Concentrated Phosphate Export Ass’n, 393 U.S. 199, 203 (1968), quoted in Laidlaw, 528 U.S. at 189.

judgment.” 912 F.2d at 647. Defendants’ argument focuses on the first requirement of adversity. In support of their argument that there is no adversity of interests with respect to the three papers, Defendants rely chiefly on this Circuit’s decision in Salvation Army v. Dept. of Community Affairs, 919 F.2d 183 (3d Cir. 1990). In Salvation Army, the government threatened to prosecute the Salvation Army for violating a state statute and regulations concerning rooming and boarding houses, and then rescinded that threat by promising to waive certain portions of the statute and regulations that were the center of the controversy. See id. at 186-87, 191. Crucial to the facts of that case was Salvation Army’s own acknowledgment that there was no live controversy with respect to the waived regulations. See id. at 191. Instead, the Salvation Army’s argument centered solely on the question of whether the Defendants had the authority to waive the statutory provisions. See id. at 191-92. The court found that it could, relying on several factors: the procedural protections to protect the Salvation Army from suit, the Defendants’ undertaking to provide the Salvation Army with a license in spite of no commitment from the Salvation Army that it would abide by the exempted provisions of the statute, and the remoteness of the possibility that the Salvation Army would be sued by one of its residents for violating the statute. See id. at 192-93 & n.6. Although the court discussed the “express assurance [of the Defendants] that there will be no enforcement against TSA of the waived provisions of the statute,” id. at 193, the court relied much more on the absence of adversity after the waiver was issued.

Here, the private Defendants have not issued anything remotely like the broad regulatory and statutory waiver seen in Salvation Army, and the other factors relied upon by that court are absent. The Defendants here have only stated that they will not “file any lawsuit over the Plaintiffs’ papers identified in their complaint.” See Hardy Decl. Exs. G (letter from RIAA); H

(letter from SDMI) and I (letter from Verance).¹⁵ Although, according to RIAA and SDMI, they have “expressed a willingness to stipulate that certain prior drafts of those papers could be published” and have pointed to a draft stipulation, see id. at 12 (emphasis added)), they never did sign a stipulation. They have not agreed to waive litigation over all previous versions and, of course, they have not agreed to waive any future publications, including the revisions to Chapter 10 that Professors Wu and Liu would like to include in a book. See Wu Decl. ¶19; Liu Decl. ¶¶ 24-25. In fact, they claim that such a waiver would be “impossible.”¹⁶ RIAA Br. at 25.

Even as to the three papers filed under seal, Defendants simply did not issue the kind of broad waiver that would destroy adversity over all issues surrounding them. In Kidder, Peabody & Co., Inc. v. Maxus Energy Corp., 925 F.2d 556, 562-63 (2nd Cir. 1991), for example, the court rejected defendant’s claim that Kidder’s request for a declaratory judgment that it was not liable to defendant for violations of federal securities laws was moot even though defendant had represented that it “would not bring any action grounded in federal securities laws against Kidder.” The Second Circuit held that without a declaratory judgment, the defendant could “put Kidder to the task of defending against the federal securities claims, id. at 563, notwithstanding the fact that the defendant had made such representations “on several occasions to the court . . .,” id. at 560.

Here, similarly, without a declaratory judgment, the Defendants can simply change their minds or interpret what they have represented in the narrowest way possible. In response to the

¹⁵ In their brief, defendants added that they would forego litigation over “subsequent translations or versions” of the three papers filed under seal, so long as they included only “immaterial, grammatical changes.” RIAA Br. at 11-12 & n.6.

¹⁶ Lawyers write waiver clauses every day; how defendants can claim that a waiver would be impossible is baffling. Plaintiffs reject defendants’ repeated assertion that plaintiffs agree that discussions about future work are just speculation. (See RIAA Br. at 12, 18.) Moreover, RIAA’s inclusion of the parenthetical “or any laws, such as those protecting trade secrets” is completely gratuitous. This lawsuit only concerns the DMCA and the click-through agreement, not

Defendants' question of what would change if this Court issued a declaration, the answer is simple: the Plaintiffs would be free to revise, summarize and expand those papers, publish parts in other papers, and publish all previous drafts without being limited to "immaterial, grammatical changes" or bound by the Defendants' discretion.

Even if this Court were to find Salvation Army controlling as to the three papers filed under seal, Plaintiff's request for declaratory relief is not moot. The only claim of lack of adversity by the Defendants concerns the papers identified in the complaint. "[N]o justiciable controversy exists *with respect to* the Felten Paper [SDMI paper] or the Wu Papers [the ICASSP paper and Chapter 10], because there is no adversity of interests." RIAA Br. at 17. As made clear in Salvation Army, a case may go forward even if there is a lack of adversity with respect to certain claims.

Plaintiffs here have presented considerable evidence that the Defendants' past threats have significantly affected the continuing exercise of their First Amendment rights. The Defendants' express reservation of the right to sue has created a broad and ongoing chilling effect throughout the scientific community. The kind of censorship they would find intolerable over recording artists they find unobjectionable over scientists. Through the DMCA, the government has effectively empowered private parties to engage in an ongoing censorship scheme. As the Supreme Court noted in Bantam Books, 372 U.S. at 69-71, this sort of scheme is a distinct First Amendment problem appropriate for judicial review.

trademark, patents or any other intellectual property rights.

CONCLUSION

For all the reasons set forth above, the private Defendants' motion to dismiss must be denied.

Grayson Barber
68 Locust Lane
Princeton, New Jersey 08540
(609) 921-0391

Gino Scarselli
664 Allison Drive
Richmond Heights, Ohio 44143
(216) 291-8601

James S. Tyre
10736 Jefferson Blvd., #512
Culver City, CA 90230
(310) 839-4114

Frank L. Corrado.
Rossi, Barry, Corrado & Grassi
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

Lee Tien
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333 x102

Attorneys for Plaintiffs