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20 UNITED STATES DISTRICT COURT  
21 WESTERN DISTRICT OF CALIFORNIA

22 UNITED STATES OF AMERICA,	)	Case No.: RL-04-9999
	)	
23 Prosecution,	)	DEFENDANTS’ MOTION TO DISMISS;
	)	MEMORANDUM OF POINTS AND
24 vs.	)	AUTHORITIES IN SUPPORT
	)	
25 DR. DANIEL BALTIMORE,	)	
26 PROFESSOR SUNDANCE LAW, JOHN	)	Date: May 21, 2004
27 JOHNSON, AND THE CALCULATING	)	Time: 2:15 pm
28 INSTITUTE OF TECHNOLOGY,	)	Courtroom: Beckman Auditorium
	)	
Defendants.	)	

Defendants respectfully submit this Memorandum of Points and Authorities in Support of their Motion to Dismiss pursuant to the court’s order setting a hearing date for May 21, 2004.

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1 **I. STATEMENT OF FACTS**

2 In the fall of 2003, Professor Sundance Law taught a course called Digital Protection. In  
3 this course, he divided the class into two halves matching a student from one half with a counterpart  
4 from the other half. One of these students was responsible for writing a digital encryption program,  
5 and the other student was assigned to try to break that encryption. In order to facilitate learning and  
6 sharing of ideas, all assignments done for the class were posted on the class web page.

7 One of these student pairs that term was Dmitri Skylore and Jon Johnson. Skylore used both  
8 content encryption and copy control information ("CCI") to protect access to copy digital content.  
9 The CCI specified the number of copies that could be made of a particular file. Skylore embedded  
10 the CCI into the content encryption using 128-bit encryption.

11 Johnson's assignment was to break Skylore's encryption. Johnson used the idea of programs  
12 such as SETI@home, in which a program harnessed the computational power of a large number of  
13 personal computers in order to solve a problem more quickly. He posted a distributional program  
14 on the class website and invited other Caltech students to download it and to contribute to breaking  
15 the encryption. Once the content encryption was bypassed, Johnson simply set the permissions to  
16 infinite copies. Johnson posted the results of his brute-force program along with his resume in the  
17 hope of getting a lucrative consulting job to help pay for his school tuition.

18 Professor Law recognized that Skylore's program was similar to "5C" Broadcast Flag  
19 technology that many major entertainment corporations are developing. Professor Law posted a  
20 few seconds of 5C encrypted video on the class website, and Johnson's brute-force program  
21 returned the decryption key within a day.

22 Word spread about Johnson's program, and soon students were going to his website to get  
23 the available decryption keys. The entertainment corporations got wind of this website and realized  
24 what the decryption keys could potentially do. They decided not to update their encryption  
25 algorithms to prevent Johnson's keys from working, which they could have done. Instead the  
26 Recording Industry Association of America (RIAA), the Motion Picture Association of America  
27 (MPAA), and Intel (co-inventor of "5C" technology) banded together to persuade the Department  
28 of Justice to prosecute Jon Johnson, Professor Law, Caltech, and President Daniel Baltimore (who

1 had not been involved at all in the unfolding events thus far). DOJ offered to drop charges in  
2 exchange for Caltech removing Johnson’s website and prohibiting Prof. Law from teaching students  
3 how to decrypt “digital rights management devices or commercial encryption technology now in  
4 use or development.” The university responded that it would be compromising academic freedom  
5 by complying with the government’s demand.  
6

## 7 **II. DIGITAL MILLENNIUM COPYRIGHT ACT (“DMCA”)**

8 The DMCA was created by Congress to criminalize the willful circumvention of technology  
9 protecting copyrighted works. The DMCA includes an "anti-circumvention provision", in 17  
10 U.S.C. § 1201(a)(1)(a), stating that "No person shall circumvent a technological measure that  
11 effectively controls access to a work protected under this title." It also includes an anti-trafficking  
12 provision, in U.S.C. § 1201(b)(1), stating that:

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

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

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

21 (C) is marketed by that person or another acting in concert with that person with that  
22 person's knowledge for use in circumventing protection afforded by a technological  
23 measure that effectively protects a right of a copyright owner to a work protected  
24 under this in a work or portion thereof.  
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1 **III. ARGUMENT**

2 **A. DTCP Does Not Effectively Control Access Under 17 U.S.C. § 1201(A)(3)(B)**

3 **1. This Court Must Read Section 1201(A)(3)(B) To Avoid The Absurdity**  
4 **That Results From A Literal Construction**

5 The DMCA is a misnomer – it is actually technology law, and a “terrible law.” *Panel*  
6 *Three: New Business Models, Regulatory Options and the Future of Copyright on the Internet*, 50  
7 AM. U. L. REV. 425, 433 (2000). The DMCA is a “terrible law” and it leads to absurd results  
8 because it was drafted with broad language and has been broadly applied by courts of other  
9 jurisdictions. *E.g.*, *Pearl Investments, LLC v. Standard I/O, Inc.*, 257 F.Supp.2d 326 (D. Me. 2003);  
10 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 253 F.Supp.2d 943 (E.D. Ky. 2003);  
11 *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000); *Sony Computer*  
12 *Entertainment American, Inc. v. Gamemasters*, 87 F.Supp.2d 976 (N.D. Cal. 1999). Although it is a  
13 well-established principal that this Court is not bound by the decisions of courts in other circuits,  
14 *U.S. v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993); *Rives v. I.C.C.*, 934 F.2d 1171, 1174 (10th  
15 Cir. 1991); *Stinson v. U.S.*, 102 F.Supp.2d 920, 922 (M.D. Tenn. 2000), this Court should give the  
16 DMCA a reasonable interpretation that reflects the intent of its framers, and thus, precludes the  
17 possibility of outrageous results.

18 This approach is deeply embedded in American history and was adopted long ago by the  
19 United States Supreme Court in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). In that  
20 case, the Holy Trinity Church entered into a contract with a priest residing in England to come and  
21 work in one of their parishes in New York. *Id.* at 458. The Church was subsequently penalized  
22 under an American law that stated in relevant part:

23 [I]t shall be unlawful for *any* person, company, partnership, or corporation, in *any*  
24 *manner whatsoever*, to prepay the transportation, or in *any way* assist or encourage the  
25 importation or migration, of *any* alien or aliens, *any* foreigner or foreigners, into the  
26 United States, its territories, or the District of Columbia, under contract or agreement,  
27 parol or special, express or implied, made previous to the importation or migration of  
28 such alien or aliens, foreigner or foreigners, to perform *labor or service of any kind* in  
the United States, its territories, or the District of Columbia.

1 *Id.* (emphasis added).<sup>1</sup> However, notwithstanding the fact that the church’s acts fell within the  
2 seemingly clear and absolute language of the law the Supreme Court held that Holy Trinity Church  
3 should not be subject to penalties under the aforementioned statute. *Id.* at 472. The Supreme Court  
4 held that Congress could not have intended to prevent *any* alien or foreigner from coming to the  
5 United States to work, especially professionals such as ministers or priests. *Id.* at 463.

6 In its holding, the Supreme Court articulated that “[i]t is a familiar rule that a thing may be  
7 within the letter of the statute and yet not within the statute, because not within its spirit nor within  
8 the intention of its makers.” *Id.* at 458. *See also In re Koenig Sporting Goods, Inc.*, 203 F.3d 986,  
9 989 (6th Cir. 2000) (“[d]eparture from the language of the legislature and resort to judicially created  
10 rules of statutory construction is appropriate only in the ‘rare cases [in which] the literal application  
11 of the statute will produce a result demonstrably at odds with the intentions of its drafters.’”)  
12 (internal citations omitted); *Helvering v. Hammel*, 311 U.S. 504, 510 (1941) (“courts in the  
13 interpretation of a statute have some scope for adopting a restricted rather than a literal or usual  
14 meaning of its words where acceptance of that meaning would lead to absurd results.”); *United*  
15 *States v. Katz*, 271 U.S. 354, 362 (1926) (“[g]eneral terms . . . [in] a criminal statute may and *should*  
16 *be limited*, where literal application of the statute would lead to extreme or absurd results, and  
17 where the legislative purpose gathered from the whole act would be satisfied by a more limited  
18 interpretation.”) (emphasis added).

19 This is not the substitution of the will of the judge for that of the legislator; for  
20 frequently words of general meaning are used in a statute, words broad enough to  
21 include an act in question, and yet a consideration of the whole legislation, or of the  
22 circumstances surrounding its enactment, or of the absurd results which follow from  
23 giving such broad meaning to the words, makes it unreasonable to believe that the  
legislator intended to include the particular act . . . [Given this,] *[a]ll laws should*  
*receive a sensible construction. General terms should be so limited in their*

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24  
25 <sup>1</sup> The Supreme Court noted that,

26 Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against  
27 any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind;' and,  
28 further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific  
exceptions, among them professional actors, artists, lecturers, singers, and domestic servants,  
strengthens the idea that every other kind of labor and service was intended to be reached by the  
first section. *Id.* at 458-459.

1           *application as not to lead to injustice, oppression or an absurd consequence.* It will  
2           *always*, therefore, be presumed that the legislature intended exceptions to its language  
3           that would avoid results of this character.

4           *Holy Trinity Church*, 143 U.S. at 458-461 (emphasis added).

5           As in *Holy Trinity Church*, a strict reading of 17 U.S.C. § 1201(a)(3)(B) leads to absurd  
6           results, which therefore makes it unreasonable to believe that Congress truly meant to define  
7           effective technological measures as simply anything that works. Section 1201(a)(3)(B) defines  
8           “technological measure[s] [that] effectively control access to a work [as those which], in the  
9           ordinary course of [their] operation, require[] the application of information, or a process or a  
10          treatment, with the authority of the copyright owner, to gain access to the work.” 17 U.S.C. §  
11          1201(a)(3)(B). On its face, section 1201(a)(3)(B) makes no discrimination between technological  
12          measures that provide *reasonably* effective access control and those that do not. Section  
13          1201(a)(3)(B) simply affords actionable protection to the overly broad category of *any*  
14          technological measure that works.

15          Therefore, it does not matter whether a copyright owner choose to protect his work using the  
16          same primitive technology that locks a personal computer in its screen-saver mode, or CSS, or  
17          DTCP, because all of those technologies qualify for protection under a plain reading of section  
18          1201(a)(3)(B). In these cases, “outmoded technologies [would] enjoy the protection of federal  
19          law.” *Hearing Before the Subcomm. on Telecomm., Trade and Consumer Prot. of the Comm. on*  
20          *Commerce*, 105th Cong. 11 (1998) (statement of Gary J. Shapiro). In fact, one DMCA  
21          commentator stated that most companies’ unwillingness “to pay for good protection” and use of  
22          “Mickey Mouse solutions” to protect copyrighted materials should not be protected because it  
23          creates an incentive for corporations to “walk in with technologically inferior solutions” with the  
24          expectation that the government will protect them anyway. *Edited & Excerpted Transcript of the*  
25          *Symposium on the Law & Technology of Digital Rights Management*, 18 BERKELEY TECH. L.J. 697,  
26          705 (2003).

27          This result cannot be justifiably harmonized with other areas of our law. For instance,  
28          another kind of property right such as land ownership includes the doctrine of “adverse possession,

1 [which] discourages the record owners from sleeping on their rights by neglecting to take the  
2 appropriate legal steps to maintain their possession.” *Pascoag Reservoir & Dam, LLC v. Rhode*  
3 *Island*, 217 F.Supp.2d 206, 212 (D.R.I. 2002). So, in one instance the law requires that a land  
4 interest holder must take reasonable steps towards safeguarding his property rights at the risk of  
5 forfeiting that interest to a squatter; but, in the other instance, the law permits the copyright holder  
6 to knowingly employ totally inadequate measures to guard his rights to distribute his work, and at  
7 the same time, allows him to vindicate those loosely guard rights through section 1201(a)(3)(B) of  
8 the DMCA. This result is unjust, oppressive, and absurd.

9 Section 1201(a)(3)(B) should not be read so broadly as to lead to injustice, oppression, and  
10 absurdity, because:

11 To adopt such a construction would put a stop to the ordinary business of life. If a  
12 literal construction of the worlds of a statute be absurd, the act must be so construed as  
13 to avoid the absurdity. [This] [C]ourt must restrain the words. The object to be  
14 reached by the act must limit and control the literal import of the terms and phrases  
15 employed.”

16 *Holy Trinity Church*, 143 U.S. at 460 (internal citations omitted). In light of *Holy Trinity Church*  
17 this Court may give section 1201(a)(3)(B) a “sensible construction”, *id.* at 461, and in doing so must  
18 consider the statute’s object, or, the intent of the legislators. *Id.* at 459-464. This brief sets forth the  
19 legislative history that allows this Court to give the DMCA a proper and just interpretation. Section  
20 1201(a)(3)(B) should not embrace any technological measures that may be employed to control  
21 access, but should be limited to those which reasonably control access.

22 **a. Congress Only Intended To Create Liability For Circumvention  
23 Of Technological Measures That Function Reasonably Well**

24 The focus of the DMCA prohibition centers on the circumvention of “technological  
25 measures which *effectively* control access.” 12 U.S.C. § 1201 (a) (emphasis added). In drafting the  
26 DMCA, Congress intended to create liability for circumvention of technological measures that  
27 functioned reasonably well, and did not intend the definition within section 1201(a)(3)(B) to sweep  
28 so broadly as to encompass any technology that simply functions. If the latter were Congress’  
intent, it could have easily and unambiguously reached that goal by excluding the key word

1 “effective.” See *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (stating it is a “settled rule that  
2 a statute must, if possible, be construed in such fashion that every word has some operative  
3 effect.”).

4 In fact, Congress intentionally “tailored [the language within the DMCA] to match the  
5 [WIPO Copyright Treaty] language” used in Article 11,<sup>2</sup> 144 CONG. REC. H7097 (Aug. 4, 1998)  
6 (statement of Hon. Rick Boucher from the Committee on the Judiciary); therefore, this Court should  
7 use the legislative history of that treaty as a starting point. Initially, Article 11, which sets forth  
8 obligations concerning technological measures, contained language that banned circumvention  
9 devices. S.J. REP. NO. 105-190, at 5 (1998). However, this language resulted in controversy and  
10 was eventually replaced by a “*milder* declaration”, *id.* (emphasis added), that provided legal  
11 protection and remedies against the circumvention of “effective technological measures.” *Id.* The  
12 new language shifts the focus of Article 11. For example, in its former state as a ban on  
13 circumvention devices, Article 11 did not discriminate between different types of protective  
14 technological measures. In contrast, the present language of Article 11 creates a distinction  
15 between protective technological measures that simply work, and those that work reasonably well  
16 by including the word “effective.” The disagreement and subsequent changes in Article 11,  
17 therefore evidence that the WIPO framers did not believe that circumvention of merely *any*  
18 technological measure was enough to impose liability.

19 In addition, when the WIPO treaties were originally introduced to Congress for  
20 implementation, the prevailing view in Congress was that “the substantive protections in U.S.  
21 copyright law already [met] the standards of the new WIPO treaties, and therefore very few changes  
22 to U.S. law [were] necessary.” *WIPO Copyright and Performance and Phonograms Treaty*  
23 *Implementation Act of 1997: Floor Statements Accompanying Introduction of S. 1121*, 105th Cong.

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24  
25 <sup>2</sup> Article 11 states that:

26 Contracting Parties shall provide adequate legal protection and effective legal remedies against the  
27 circumvention of effective technological measures that are used by authors in connection with the  
28 exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of  
their works, which are not authorized by the authors concerned or permitted by law. WIPO  
Copyright Treaty, Dec. 20, 1996, art. 11, 36 I.L.M. 65, 71 (emphasis added).

1 (1997) (statement of Senator Orrin Hatch). In fact, this “minimalist bill,” otherwise known as the  
2 DMCA, only planned to provide “legal protections against the circumvention of *certain*  
3 technologies that copyright owners use to protect their works.” *Id.* (emphasis added).<sup>3</sup> *See also* S.  
4 1121, 105th Cong. § 3 (1997). For instance, the drafters of the DMCA expressly stated and stressed  
5 in their reports that “[technological] measures that cause noticeable and recurring adverse effects on  
6 the authorized display or performance of works should not be deemed to be effective,” and would  
7 therefore fall outside the meaning of section 1201(a)(3)(B). 144 CONG. REC. H7094 (Aug. 4, 1998).

8 Accordingly, the framers purposely constructed section 1201(a) to grant protection only  
9 against the circumvention of “technological measures that *effectively* control access,” 17 U.S.C. §  
10 1201(a) (emphasis added), – “not against *any* technological measure whatsoever.” 144 CONG. REC.  
11 H7097 (Aug. 4, 1998) (statement of Hon. Rick Boucher). This distinction is evident from the  
12 legislative histories of the WIPO Copyright Treaty and the DMCA. Therefore, this Court should  
13 read section 1201(a)(3)(B) in light of the intent of Congress, and afford protection under the DMCA  
14 only when technological measures that function reasonably well are employed.

15  
16 **2. 5c Digital Transmission Content Protection Does Not Effectively Protect**  
17 **Content**

18 Section 1201(a)(1)(A) of the DMCA prohibits the circumvention of “a technological  
19 measure that *effectively* controls access to a work protected under this title.” *Id.* (emphasis added).  
20 Further restrictions put in place by the act, such as section 1201(b)(1), criminalize the creation or  
21 trafficking of a device that circumvents any “technological measure that effectively protects a right  
22 of a copyright owner.” *Id.*

23 The ease with which the encryption used by DTCP was circumvented is a testament to its  
24 ineffectiveness. Johnson’s use of distributed computing is the descendent of several previous  
25 successful uses. (Schoen Decl. ¶¶ 8-10.) Johnson’s “brute force” attack required an insignificant  
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27  
28 <sup>3</sup> Portions of S. 1121 were subsequently incorporated into S. 2037, which were then incorporated into H.R.  
2281.

1 amount of time to defeat the security measures imposed: *less than one day*. It is a stretch to suggest  
2 that any technological measure that can be defeated in so little time is effective at protecting its  
3 contents.

4         According to expert testimony, the use of 56-bit keys such as the 5C standard is vulnerable  
5 to attacks using distributed computing. (*Id.*) Anyone competently designing an encryption standard  
6 knows this fact, and considers it when choosing a key length. Thus, it is irresponsible from a  
7 security standpoint to place trust in 56-bit keys, when those keys are so widely regarded as insecure.  
8 Compounding this is the fact that the encryption could have simply employed a larger key length,  
9 which could have prevented such distributed attacks against DTCP. If a safe has repeatedly been  
10 burglarized, a responsible person does not continue to store valuables in it, especially when given  
11 the option of a stronger, newer safe. All designers of encryption systems expect attempts to be  
12 made to defeat the security measures used. To employ an encryption that is reasonably expected to  
13 be broken and exploited is to practically the same as giving explicit authorization to view and  
14 control the encrypted data.

15         The effectiveness of DTCP is also called into doubt by the presence of unsophisticated  
16 alternatives to Johnson's efforts. At this point, someone seeking to illegally copy and distribute  
17 copyrighted material would not need anything more than a mere digital video camcorder, which  
18 would enable him or her to record media and then copy it to a computer to be later distributed.  
19 When scenarios such as this occur, the digital media easily becomes publicly available, regardless  
20 of the presence of DTCP encryption. Therefore, DTCP fails its core purpose of preventing the  
21 illegal copying and distribution of protected content. This is hardly the sign of an effective  
22 technological measure.

23         Traditionally, circumvention of insecure safety measures leads to their replacement by  
24 superior alternatives that also fulfill the goals and objectives of users. (*Id.* at ¶¶ 13-14.) Thus, to  
25 adopt the 5C standard is to take a technological step backwards. Giving DTCP legal protection will  
26 only encourage the use of insecure techniques, and resist developments in technology that render  
27 those insecure techniques obsolete. In addition, this will waste judicial resources as more and more  
28 copyright infringers find it within their power to violate encryptions that rely not on effective

1 technological measures, but judicial precedent. This Court should not find DTCP to be an effective  
2 technological measure, because it will only lead to more copyright infringement, more trials, more  
3 harm, and no end in site.

4  
5 **B. Charges Must Be Dismissed Against Defendants Caltech, Baltimore And Law**

6 The DMCA prohibits any person from offering or providing any service or device that might  
7 enable the circumvention of a technological measure that effective controls access to<sup>4</sup>, or protects a  
8 right of a copyright owner in<sup>5</sup>, a copyrighted work. The DMCA does not, however, provide for any  
9 criminal liability for Caltech, Daniel Baltimore or Professor Law. These defendants are not directly  
10 liable for any acts of their own, and they are not vicariously liable for any of the acts of Jon  
11 Johnson.

12 **1. Charges Against Caltech Must Be Dismissed Because It Is An**  
13 **Educational Institution And, As Such, Is Exempt From Liability Under**  
14 **17 U.S.C. § 1204**

15 All charges against Caltech must be dismissed because the DMCA specifically exempts  
16 educational institutions from criminal liability.<sup>6</sup> Regardless of whether any actions in the case give  
17 rise to potential liability, section 1204 specifically exempts Caltech.

18 **2. There Can Be No Direct Liability For President Baltimore Or Professor**  
19 **Law**

20 The criminal provision of the DMCA also requires that a person violate one of the other  
21 provisions of the act “willfully and for purposes of commercial advantage or private financial gain”<sup>7</sup>  
22 in order to give rise to criminal liability. There has been no evidence presented that suggests that  
23

24  
25  
26 <sup>4</sup> 17 U.S.C. § 1201(a)(2)

27 <sup>5</sup> 17 U.S.C. § 1201(b)(1)

28 <sup>6</sup> 17 U.S.C. § 1204(b)

<sup>7</sup> 17 U.S.C. § 1204(a)

1 either President Baltimore or Professor Law “willfully” violated the DMCA. Moreover, there is no  
2 evidence that that either acted with any purpose of commercial advantage or financial gain.

3  
4 **a. Neither President Baltimore Nor Professor Law Willfully**  
5 **Violated Any Provisions Of The Dmca**

6 Under the facts presented by the government, there are three actions that might possibly give  
7 rise to violations under the DMCA. First, Jon Johnson posted a copy of his distributional program  
8 on the class website. Second, Johnson posted a copy of the decryption key obtained by his  
9 program, along with his resume, on the same site. Lastly, Professor Law posted a few seconds of  
10 encrypted video to the website to see if his student’s homework assignment might also work on 5C  
11 technology. None of these actions involved the direct participation, or were performed with the  
12 knowledge of President Baltimore – thus he may not be held directly liable for any alleged  
13 violations.

14 Professor Law, having no direct involvement in either of the first two actions, did post the  
15 clip of the encrypted video to the site for testing, but it would be a stretch to argue that his action  
16 constitutes a violation of any of the provisions of the DMCA. He did not “circumvent a  
17 technological measure that effectively controls access to a work protected under this title”<sup>8</sup> since the  
18 act of circumvention, if performed by anyone, could only have been performed through the  
19 collective efforts of the computers running the distributed force program created by Johnson. There  
20 is no evidence that Professor Law ever participated in that group effort – the facts presented by the  
21 government only indicate that Johnson solicited the help of fellow students for the alleged  
22 “circumvention.”<sup>9</sup>

23 In addition, Professor Law did not “manufacture, import, offer to the public, provide, or  
24 otherwise traffic in any technology, product, service, device, component” that might enable others  
25

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26  
27 <sup>8</sup> 17 U.S.C. § 1201(a)(1)(A)

28 <sup>9</sup> Facts, p. 1

1 to circumvent an access-control measure, as is separately prohibited by the DMCA.<sup>10</sup> As opposed  
2 to the defendant in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), who enabled  
3 others to download the DeCSS decryption software, Professor Law's action could in no way be  
4 construed to have enabled anyone else to circumvent any technological measures. The fact that  
5 other persons later discovered the effectiveness of Johnson's homework assignment and might have  
6 used it to circumvent access-control measures is of no import in this case, as the government has not  
7 provided any evidence that Professor Law promoted the website to them or even told anyone at all  
8 about it.

9 **b. Professor Law Had No Purpose Of Commercial Or Private**  
10 **Financial Gain**

11 Another reason that Professor Law may not be held directly criminally liable is that there is  
12 no evidence that he was motivated by a financial purpose, either commercial or personal, as  
13 required by the DMCA.<sup>11</sup> Professor Law's only direct action was his submission of a video clip to  
14 Johnson's site to test whether the site could decrypt it. The government has not produced a single  
15 piece of evidence to suggest that Professor Law had any financial motive for doing so, except that  
16 he was attempting to verify the effectiveness of his student's homework assignment.

17  
18 **3. Neither President Baltimore Nor Professor Law May Be Held**  
19 **Vicariously Liable For Any Alleged Violations Of The Dmca**

20 **a. Neither Of The Defendants Meet The Requirements For**  
21 **Vicarious Liability Under Copyright Law**

22 The doctrine of vicarious liability has evolved to keep up with the changing world of  
23 copyright law. While initially limited to an employer-employee relationship, vicarious liability has  
24 expanded in recent years to encompass other relationships where one person has a degree of a  
25 responsibility or influence over the actions of another. Now, vicariously liability attaches when one  
26 "has the right and ability to supervise the infringing activity and also has a direct financial interest

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27 <sup>10</sup> 17 U.S.C. § 1201(a)(2)

28 <sup>11</sup> 17 U.S.C. § 1204(a)(1)

1 in such activities.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 438 (1984)  
2 (citing *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir.  
3 1971)).

4 **i. No Right And Ability To Control The Infringer’s Acts**

5 The first requirement of vicarious liability outside of the traditional employment relationship  
6 is that the defendant must have the “right and ability to supervise the infringing activity.” *Sony*, 464  
7 US at 438. This requirement has developed from the combination of two lines of cases. In the  
8 landlord-tenant cases, the courts held that a landlord who lacked knowledge of the infringing acts of  
9 his tenants and who exercised no control over the premises was not liable for infringing sales by his  
10 tenants. *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938). In the dance-hall cases, on the other hand,  
11 courts have held that the owner of a dance-hall is liable for the infringing activities of the bands that  
12 perform at his venue because the dance-hall operator can control the premises and received direct  
13 financial benefit from the infringing activities. *Dreamland Ball Room, Inc. v. Shapiro, Bernstein &*  
14 *Co.*, 36 F.2d 354 (7th Cir. 1929).

15 There is no dispute that Professor Law and President Baltimore each have some ability to  
16 supervise and even control the actions of one of their students. It is quite a different thing, however,  
17 to say that the government, through legislation, should be able to require them to do so. The courts  
18 have long allowed for the imposition of certain rules by the legislature into traditional employment  
19 relationships, and even into other types of agency relationships. The courts have been loathe,  
20 however, to allow the legislature to delve too deeply into the relationship between teachers and  
21 students. “No one should underestimate the vital role in a democracy that is played by those who  
22 guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges  
23 and universities would imperil the future of our Nation.” *Sweezy v. State of New Hampshire*, 354  
24 U.S. 234, 250 (1957). To the extent that the DMCA creates criminal liability for decisions that  
25 educators make regarding what they teach their students, those regulations are unconstitutional  
26 violations of the First Amendment as applied. See section 4, below.



1 always remain free to inquire, to study and to evaluate, to gain new maturity and understanding;  
2 otherwise our civilization will stagnate and die.” *Sweezy*, 354 U.S. at 250.

3 Applying the provisions of the DMCA in a way that would require educators to make  
4 fundamental changes to the substance of curriculum is surely suspect. Such an application would  
5 amount to a content-based restriction – to avoid criminal charges, the defendants would have to  
6 remove material from the website based on its content and would have to agree not to teach a  
7 particular discipline because of its content. Content-based restrictions are presumptively  
8 unconstitutional. “Regulations which permit the Government to discriminate on the basis of the  
9 content of the message cannot be tolerated under the First Amendment.” *Regan v. Time, Inc.*, 468  
10 U.S. 641, 648-649 (1984).

11 Freedom of speech includes the freedom of educators to make decisions over what to teach  
12 and how to teach, and it is a fundamental right of all persons. A content-based restriction on that  
13 freedom must be narrowly tailored to serve a compelling state interest. *Perry Ed. Assn. v. Perry*  
14 *Local Educators’ Assn.*, 460 US 37, 45 (1983). In addition, the regulation must be necessary to  
15 further that compelling state interest, and there must be no less restrictive means available. *Sable*  
16 *Communication of Cal, Inc. v. FCC*, 492 US 115, 126 (1989) (The Government may . . . regulate  
17 the content of constitutionally protected speech in order to promote a compelling interest if it  
18 chooses the least restrictive means to further the articulated interest.”).

19 A regulation or statute is narrowly tailored only when “the means chosen do not ‘burden  
20 substantially more speech than is necessary to further the government’s legitimate interests.’”  
21 *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (citing *Ward v. Rock Against*  
22 *Racism*, 491 U.S. 781, 799 (1989)). Such a regulation, however, is not narrowly tailored when “a  
23 substantial portion of the burden on speech does not serve to advance [the state’s content-neutral]  
24 goals.” *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991).

25 To impose criminal liability here for the refusal of Baltimore and Law to take down the class  
26 website and stop teaching decryption would be to burden substantially more speech than necessary  
27 to further the legitimate goal of the DMCA, which is to protect copyright holders from  
28 infringement. Such a goal is only legitimate on its face, however, for as soon as it is applied here, it

1 serves to not only prohibit copyright infringement but to substantially affect what can be taught at  
2 Caltech. In this regard, the DMCA is not narrowly drawn enough to survive strict scrutiny. As the  
3 Supreme Court has stated, “the judiciary is well advised to refrain from imposing on the States  
4 inflexible constitutional restraints that could circumscribe or handicap the continued research and  
5 experimentation so vital to finding even partial solutions to educational problems and to keeping  
6 abreast of ever-changing conditions.” *San Antonio Independent School Dist. v. Rodriguez*, 411 US  
7 1, 42-43 (1973).

8 If the DMCA is ever to be applied to the educational setting, it must be made more precise  
9 to avoid situations such as this case. The teacher-student relationship is not the same as employer-  
10 employee or landlord tenant. Teachers and educators must be allowed to make decisions regarding  
11 the content of curriculum with respect for solid academic principles and without heavy-handed  
12 government intrusion. Without provisions that exempt Professor Law for just teaching his class  
13 and President Baltimore for supporting his teacher, the DMCA stands as a clear violation of the  
14 First Amendment rights of both defendants and is unconstitutional as applied

15  
16  
17 Respectfully submitted,

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