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MESSAGE

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICROSYSTEMS SOFTWARE, INC. Plaintiff-appellee, v. SCANDINAVIA ONLINE AB, ISLANDNET.COM, EDDY L.O. JANSSON, and MATTHEW SKALA Defendants-appellees WALDO JAQUITH; LINDSAY HAISLEY; BENNETT HASELTON Appellants	Court of Appeals No. (District Court Civil Action No. 00-10488-EFH)

MOTION FOR STAY OR, IN THE ALTERNATIVE FOR EXPEDITED CONSIDERATION

Pursuant to Fed. R. App. Pro. 8(a) and 31(a)(2), appellants Jaquith, Haisley, and Haselton respectfully ask the Court to stay the application of the final injunction entered on March 28, 2000, at least as to appellants. In the alternative, appellants ask the Court to expedite this appeal. Because the injunction has resulted in the restraint of constitutionally protected speech, and for the reasons stated below, a stay is appropriate. The District Court's Stipulated Permanent Injunction [Injunction] is attached hereto as Exhibit A. The District Court's Findings of Fact and Conclusions of Law [Findings] is attached hereto as Exhibit B. The Complaint is attached hereto as Exhibit C. In support of the motion, appellants state:

The District Court has issued an injunction that potentially prevents literally dozens of unrelated individuals all over the world from engaging in speech about a matter of public importance. It has enjoined defendants, and perhaps appellants, from posting a computer program written by defendants on the Internet. Plaintiffs allege that defendants were able to write the program by "reverse engineering" plaintiffs' product Cyber Patrol.

Cyber Patrol is sold as a product that will block access to allegedly inappropriate Internet web sites. Software such as Cyber Patrol has been a matter of enormous public debate for several years and much of the debate has centered on the degree to which products such as Cyber Patrol erroneously block web sites that are entirely appropriate for all ages. Defendants' program allows the lawful owners of Cyber Patrol to determine which sites the software blocks and which it does not (facts which Cyber Patrol attempts to keep secret). Supplemental Affidavit of Irwin Schwartz, March 27, 2000 [Schwartz], attached hereto as Exhibit D, at Attachment A. The Court issued its injunction in the name of protecting the right of parents to successfully block access of their children to the Internet. The irony is that its order prevents parents from having information about the usefulness of Cyber Patrol in achieving that goal.

The Court issued its injunction even though, as a matter of law, there cannot have been a violation of the Copyright Act, even accepting as true the allegations on the face of the Complaint, because any alleged copyright violation occurred overseas. E.g., Twin Books Corp v. Walt Disney Co, 83 F.3d 1162, 1166-67 (9th Cir. 1996); Update Art v. Modlin Publications, 843 F.2d 67, 73 (2d Cir. 1988). The Court also used an interpretation of copyright law that has been rejected by the two Circuits to have addressed it. See, e.g., Sony v. Connectix, __ F.3d __, 53 U.S.P.Q.2d (BNA) 1705 (9th Cir. 2000); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510

(9th Cir. 1992)(both holding that "reverse engineering" is fair use); Vault v. Quaid, 847 F.2d 255 (5th Cir. 1988)("reverse engineering" permissible under 17 U.S.C. §117).

The Court issued its injunction in violation of elementary principles of due process. Plaintiffs and defendants settled and did not dispute certain facts. Three of the unrelated individuals who may be bound by order (appellants here) appeared and sought to contest those facts, at least insofar as they justified an order against them. For example, one of the Court's key factual findings is that the injunction serves a "general public good," a finding supported solely by the verified Complaint and an affidavit from plaintiffs' counsel. The District Court refused to permit appellants to challenge the facts. The Court's order allows appellants to appear only as defendants in a subsequent contempt action, where the underlying facts, and the validity of the underlying order, could not be contested.

HISTORY OF THE CASE

This case was filed on March 15, 2000 on behalf of plaintiffs, the corporate owners of a product called Cyber Patrol. Findings ¶ 1-3, 12. Defendants are residents of Sweden and Canada. Complaint, ¶ 3-4. The Complaint alleged that defendants violated Cyber Patrol's copyright rights when they "reverse engineered" Cyber Patrol. Complaint, ¶ 21.

Cyber Patrol is a product used by individuals, schools, libraries, corporations and others. When installed on a computer, it prevents access to a list of Internet web sites selected by Cyber Patrol. That list is kept secret by Cyber Patrol. Defendants' reverse engineering resulted in a program, consisting of computer code that defendants themselves wrote. The code made it possible for lawful owners of Cyber Patrol to view the list of sites that the product censors. Schwartz affidavit, at Attachment A. Defendants placed the computer code on their own web

sites hosted by Internet Service Providers in Sweden and Canada. Complaint ¶¶ 5-6. Defendants gave permission for others to copy the code.

The Complaint does not allege that the reverse engineering, and therefore the alleged copyright violation, occurred in the United States. It implies that it occurred in Canada and/or Sweden. Complaint.

On March 17, 2000, the plaintiffs obtained a temporary restraining order against defendants "and those in active concert or participation with them" prohibiting posting of the code on the Internet. Temporary Restraining Order, March 17, 2000, attached as Exhibit E. The court set March 27, 2000, for a hearing on a preliminary injunction. Id. Plaintiffs served that order on appellants, who were not parties to the action, along with a cover letter suggesting that appellants were bound by the order. Schwartz affidavit at ¶4; Affidavit of Sarah Wunsch, April 10, 2000; and Declarations of Lindsay Haisley, April 11, 2000 and Waldo Jaquith, April 11, 2000, attached collectively and referred to as Exhibit F. (All three affidavits were submitted to the District Court. The District Court refused to accept the latter two apparently on the grounds that he had already ruled on the motion for a stay and they were therefore untimely. Order 4/12/00. If those two declarations are not considered part of the Record, they are attached as permitted by Fed. R. App. Pro. 8(a).) Plaintiffs served appellants by email and represented to appellants that such service had been authorized by the District Court. Exhibit F. Plaintiffs also served subpoenas on appellants seeking information. Schwartz affidavit, at Exhibit A.

Appellants are individuals who run "mirror" sites. Schwartz affidavit, ¶2; Exhibit F. Appellants placed copies of the code written by defendants on their web sites (or "mirror"-ed it). Exhibit F.

Appellants filed a Motion to Quash the subpoenas. Appellants also filed an Opposition to Motion for Preliminary Injunction. Appellants appeared before the District Court on March 27, 2000, to argue that no injunction should issue or, at least, the injunction should not bind appellants. Among the arguments explicitly made by appellants is that the Court did not have personal jurisdiction over them.

At the start of the hearing on plaintiffs' motion for a preliminary injunction, plaintiffs advised the Court that they had settled with defendants. They proffered a proposed Final Injunction which bound defendants and those "in active concert." In an affidavit by counsel, plaintiffs asserted that all individuals who ran mirror sites, such as appellants, were "in privity" with defendants and could be bound by the injunction. Schwartz affidavit, ¶ 3.

At oral argument, appellants asked the Court to refuse to enter the injunction for a variety of legal reasons discussed below and because the Court lacked personal jurisdiction over appellants. Appellants expressly denied the facts as presented by plaintiffs. Appellants also asked the Court, if it decided to enter the injunction, to clarify whether appellants were bound by it. The following day, appellants asked the Court for permission to file a supplemental memorandum of law opposing the injunction. The Court granted that request.

The Court entered a final injunction on March 28, 2000. The injunction binds defendants "and all persons in active concert or participation" with defendants. Injunction (Exhibit A), p. 1. The injunction requires plaintiffs serve it on "all persons in active concert or participation" by "certified mail to last known address." Injunction, p. 2. Plaintiffs have served at least two (Jaquith and Haisley) of appellants with a copy of the injunction (and are presumably seeking to serve the third). Exhibit F.

The Court found, without any evidence having been taken and based on the conclusory affidavit of plaintiffs' counsel, that "many" of the persons who created the mirror sites did so for the "avowed purpose of seeking to prevent this Court from awarding meaningful relief." Schwartz affidavit at ¶3; Findings, ¶15. The Court made no findings with respect to appellants.

Finally, the Court held that "[a]ny violation of this injunction shall be determined by the Court only on the filing by Plaintiffs of a Motion for an Order to Show Cause Why a Certain Person or Entity Should Not Be Held in Contempt and after full hearing thereon." Injunction, p. 2 (emphasis added). The Court also granted appellants' motion to quash the subpoenas.

The effect of the Court's order is to leave appellants chilled from engaging in speech by the very real prospect of a contempt finding if the District Court, on plaintiffs' motion, deems them to have been bound by the order -- a state of uncertainty that, as argued below, is constitutionally unacceptable. Appellants can presumably argue that they are not "in active concert," but that argument is available only if appellants risk contempt, at which point precedent suggests they cannot challenge the merits of the underlying decree. This result -- that speech can be enjoined without the speaker ever having the chance to appeal from the factual and legal findings underlying such an injunction -- is untenable under basic principles of due process.

Appellants sought a stay from the District Court. That application was denied. The District Court said that it had "refused to issue an advisory ruling for the benefit of nonparties" and relegated them to "the usual procedure for adjudication of any contempt." Order, April 11, 2000, attached as Exhibit G. The Court also held that appellants "have no standing to pursue any appeal." Id.

STANDING TO APPEAL

Although appellants were not officially parties to the proceeding below, they do have standing to appeal. Appellants appeared in the District Court and argued against the entry of the injunction. The District Court granted three motions filed by appellants (to argue pro hac vice, to quash the subpoenas, to submit a supplemental brief) and denied two (stay, supplemental affidavits). Plaintiffs argued that appellants were bound by the Court's order. Counsel for plaintiffs submitted an affidavit asserting that "mirror sites" were in privity with defendants. Schwartz affidavit, ¶ 3. Plaintiffs' press release about the injunction said that "[t]he Court order ... also applies to so called 'mirror' sites..." http://www.microsys.com/news/Press/000328.htm. Finally, plaintiffs served the order on appellants in order to bind them. Exhibit F.

Nonparties may appeal an order where "a lower court specifically directs an order at a nonparty or enjoins it from a course of conduct." Dopp v. HTP, 947 F.2d 506, 512 (1st Cir. 1991) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-12 (1969)). More specifically, the general rule precluding appeals by nonparties does not apply to nonparties (1) that have participated in the proceedings below, and (2) when the equities weigh in favor of hearing the appeal. Keith v. Volpe, 118 F.3d 1386, 1391 (9th Cir. 1997) (holding that nonparty had standing to appeal although he did not seek to intervene because he filed a Memorandum of Points and Authorities, participated in oral argument, and because plaintiffs sought to have preliminary injunction applied to him while also attempting to "thwart[] the nonparty's right to appeal") (citing S.E.C. v. Wencke, 783 F.2d 829, 834 (9th Cir. 1986)); Caplan v. Braverman & Kaskey, 68 F.3d 828, 836 (3rd Cir. 1995) (holding that nonparty had standing to appeal although it did not seek to intervene because it participated in hearing on defendants' emergency motion, it

must uphold its contractual terms with its policy holders, and it has a stake in the outcome of pending settlement negotiations) (citing Binker v. Pennsylvania, 977 F.2d 738, 745 (3rd Cir. 1992)); Curtis v. City of Des Moines, 995 F.2d 125, 128 (8th Cir. 1993) (holding that nonparties had standing to appeal although they did not seek to intervene because they actively participated in post-trial executions on the judgment, they contested issues later raised on appeal, they had an interest which was affected by the lower court's judgment, and because the district court treated them as parties by accepting their briefs); Kenny v. Quigg, 820 F.2d 665, 668 (4th Cir. 1987) (holding that nonparty had standing to appeal because he participated significantly in the district court proceedings by being kept apprised of the fiduciary's activities and of the proceedings in the district court, his memorandum and argument were considered by the court, and he had a substantial interest in the outcome of the district court proceedings); U.S. v International Brotherhood of Teamsters, 931 F.2d 177, 183 (2nd Cir. 1991). See also Williams v. Morgan, 111 U.S. 684 (1884) and cases cited therein (nonparties may appeal in appropriate cases).

Appellants did participate in the proceedings below. The equities favor allowing appellants to appeal. When a nonparty has been forced into the proceeding against his will, and attempts are subsequently made to "thwart the nonparty's right to appeal by arguing that he lacks standing," the equities weigh in favor of conferring standing on the nonparty. Keith, 118 F.3d at 1391. Ultimately, the balancing of the equities favors allowing the appellants' appeal to proceed because the injunction has a direct effect on them. See, e.g., Caplan, 68 F.3d at 836; Curtis, 995 F.2d at 128, Dopp, 947 F.2d at 512. Moreover, this injunction restricts speech and standing rules have often been viewed in a more relaxed fashion in free speech cases. New York State

Club Ass'n, Inc., v. City of New York, 487 U.S. 1, 11 (1988) (quoting Taxpayers for Vincent, 466 U.S. at 798).

If appellants are not permitted to appeal, they will never have the opportunity to contest the facts or the conclusions of law that form the basis for the injunction. Those facts were found by the District Court solely on the basis of the Complaint and an affidavit by counsel for plaintiffs. "Ordinarily the validity and terms of an injunction are not reviewable in contempt proceedings." G. & C. Merriam Co. v. Webster Dictionary, 639 F.2d 29, 34 (1st Cir. 1980).

The District Court found that appellants did not have standing relying on Marino v. Ortiz, 484 U.S. 301 (1988). In the context of whites objecting to a race-conscious settlement, Marino held that where a "nonparty has an interest that is affected by the trial court's judgment," the "better practice" is for that nonparty to intervene. Appellants have much more than "an interest that is affected;" they are arguably bound by the order and clearly risk contempt if they violate it. As the Keith court held, Marino is inapplicable when the appellant has been "haled" into court over his objections. 118 F.3d at 1391, n. 7; Curtis, 995 F.2d at 128. (Either appellants are bound by the order, in which case they have been haled into court, or they are not, in which case the court should free them from the risk of contempt.) The Circuit Court cases cited above correctly hold that under these circumstances, an appeal may be taken by nonparties.

STANDARDS FOR A STAY

In this Circuit, a party seeking a stay must show that the party seeking the stay will suffer irreparable harm if it is not granted, that the balance of hardships favors a stay, that the party seeking the stay is likely to succeed, and that the public interest will be served by a stay. Providence Journal Co. v. FBI, 595 F.2d 889 (1st Cir. 1979).

IRREPARABLE HARM

The irreparable harm to appellants is simple. They have been enjoined from engaging in speech. Junger v. Daley, 2000 Fed. App. 0117P (6th Cir., April 4, 2000); Bernstein v. Department of State, 974 F.Supp. 1288 (N.D. Cal. 1997)(computer code is speech). As such, this is a classic prior restraint on speech. The "chief purpose of the First Amendment is to prevent previous restraints upon publication." Near v. Minnesota, 283 U.S. 697, 713 (1931) (striking down statute that permitted a perpetual injunction against a "malicious, scandalous and defamatory newspaper, magazine or other periodical"). "[A]ny system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity." Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963) (morality commission, whose purpose was to recommend prosecution of obscenity, imposed unconstitutional prior restraint by sending notices to booksellers that certain books were objectionable). The Supreme Court has warned that "[e]ven where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this most extraordinary remed[y] only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures." CBS Inc. v. Davis, 510 U.S.1315, 1317 (citing Bantam to stay injunction by South Dakota state court that would have prevented CBS from airing investigative news footage on meat packing industry).

It cannot be disputed that a prior restraint of speech is, itself, irreparable harm to the defendants, the appellants, and others. As the Supreme Court has stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976).

The District Court found the factor of irreparable harm irrelevant in determining whether to grant the injunction. Findings, ¶37.

BALANCE OF HARDSHIPS

There will be no practical harm to plaintiffs if a stay is granted. Neither the mirror sites nor the defendants posted material created by plaintiffs or then subject to plaintiffs' copyright. The only material posted was original material written by defendants.

In addition, plaintiffs have already mitigated any damage to them without the injunction. The code written by defendants and mirrored by appellants is analogous to a key that unlocks the Cyber Patrol blocked sites list. However, Cyber Patrol has changed the lock and any owner may download the new lock so that the key no longer works. See Web page of Cyber Patrol, attached hereto as Exhibit H, submitted to the District Court at argument. In addition, Cyber Patrol is a product that blocks access to web pages. It has blocked access to all of the "mirror" sites. Thus, lawful owners of Cyber Patrol cannot go to those pages to get the key. Id.

The District Court found that there was no hardship to defendants who had voluntarily agreed to be enjoined from posting the code. Findings, ¶52. The District Court did not address the hardship to appellants who are restrained from engaging in speech they believe they are entitled to utter.

LIKELIHOOD OF SUCCESS: COPYRIGHT

The basis for the injunction is a claim of copyright infringement. Plaintiffs alleged that defendants made "intermediate copies" of plaintiffs' copyright-protected software. But plaintiffs did not claim that the software that defendant created and posted on the Internet contained an infringing copy of plaintiffs' software. Rather, their claim was that in the course of developing

their software, the "reverse-engineering" process used by defendants required them to make intermediate copies of the plaintiffs' program.

However, even if this reverse engineering would have violated U.S. law (and, for the reasons stated below it would not), the Copyright Act does not govern copying that occurs in another country. Plaintiffs' complaint alleges that defendants engaged in reverse engineering of plaintiffs' copyrighted Cyber Patrol program in knowing and willful violation of U.S. copyright law. All of the acts of reverse engineering alleged in plaintiffs' complaint, however, occurred in Canada or Sweden. It is well-settled that U.S. Copyright laws have no extraterritorial application. E.g., Twin Books Corp v. Walt Disney Co, 83 F.3d 1162, 1166-67 (9th Cir. 1996); Update Art v. Modlin Publications, 843 F.2d 67, 73 (2d Cir. 1988). See United Dictionary v. G&C Merriam Co., 208 U.S. 260 (1908). "Because the copyright laws do not apply extraterritorially, each of the rights conferred under the five section 106 categories must be read as extending 'no farther than the [United States'] borders." Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1094 (9th Cir. 1994) (en banc) (quoting 2 Paul Goldstein, Copyright: Principles, Law and Practice § 16.0 at 675 (1989)).

The sole activity alleged to have occurred in the U.S. is that defendants published a March 11, 2000, press release that they circulated widely on the Internet, including through web sites in Massachusetts and elsewhere in the United States "encouraging United States citizens to obtain copies" of defendants' program "by downloading or replicating it into the United States." Findings ¶10, 31. Circulating a press release describing reverse engineering, even if the reverse engineering were itself unlawful, does not and could not violate U.S. copyright law.

The District Court also appeared to find that it had subject matter jurisdiction based on cases holding that when "an alleged infringing act occurring outside the United States is transmitted into the United States, the Copyright Act is implicated." Findings, ¶28. In all of those cases, the infringing material was itself transmitted into the United States. In this case, even accepting all of plaintiffs' allegations as true, the alleged infringement took place overseas. The only thing transmitted into the United States was the original program written by defendants, not plaintiffs' copyrighted material. Under these circumstances, the Court did not have subject matter jurisdiction. Subafilms, 24 F.3d at 1094-96.

Moreover, the effect of the District Court's holding is to make all speech on the Internet, which can be read anywhere in the world, subject to U.S. copyright law even if any infringement took place solely overseas. There is no basis in this case for such a radical expansion of U.S. law. See also Millenium Enterprises, Inc. v. Millenium Music, LP, 33 F. Supp. 2d 907, 915 (D. Or. 1999); Zippo Manuf. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123 (W.D. Pa. 1997); ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323 (D.S.C. 1999); Edberg v. Neogen, 17 F. Supp. 2d 104 (D. Conn. 1998) (all holding that personal jurisdiction may not be established solely by the accessibility of a web site in a specific jurisdiction).

The Court erred in its interpretation of copyright law for an additional reason. Even if defendants made a copy of Cyber Patrol and are subject to U.S. law, they did so legally. Federal courts have repeatedly found reverse-engineering of software to be "fair use," when it is necessary to gain access to the unprotected ideas and processes embodied in source code. See, e.g., Sony v. Connectix, __ F.3d __, 53 U.S.P.Q.2d (BNA) 1705 (9th Cir. 2000); Sega Enter. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832

(Fed. Cir. 1992). These courts found fair use even though the alleged infringer did so for commercial purposes. In this case, there is no allegation that either defendants or appellants acted for any commercial purpose. In addition, the Fifth Circuit has found that reverse engineering is permissible under §117 of the Copyright Act. Vault v. Quaid, 847 F.2d 255 (5th Cir. 1988).

The Court also relied on a statement usually attached to Cyber Patrol's product that reverse engineering is impermissible. Such agreements have been found preempted by federal copyright law. Vault v. Quaid, 847 F.2d 255 (5th Cir. 1988). But see ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

The District Court rejected "fair use" based on defendants' refusal to assert it. That refusal should not be binding on appellants. The District Court also rejected it on the basis of the "general public good." However, the District Court did not have an evidentiary hearing on the public good. Whatever the "general public good" of products such as Cyber Patrol, it is difficult to establish that it is in the "general public good" for the owners and prospective owners not to know what is being blocked. It is even more difficult to argue that the public, as it decides whether to use such products in libraries and schools, has a "general good" in being prevented from knowing what is being blocked. Finally, the District Court held that the defendants' code would "adversely affect the potential market." If the factual record had not consisted solely of plaintiffs' submissions, it might have shown, inter alia, that other such products have revealed their blocked site list without harm to the market, that Cyber Patrol allows and has allowed similar programs that reveal their blocked site list without harm to the market, and that additional information by consumers might have increased, not decreased the market. Indeed, the market

would only suffer if Cyber Patrol were shown to be a poor product. Hiding that fact, if it is shown to be true, can hardly be in the public good.

To the extent that defendants' program also allowed owners of Cyber Patrol to uncover the password of the principal owner, it might be argued that the general good was harmed. That argument would have to be weighed against other "general good" fostered by the revealing of the blocked site list and by the effective steps Cyber Patrol has itself taken to prevent that harm.

Both because the Court had no subject matter jurisdiction, and because any copying done was permitted by copyright law, appellants are likely to succeed in reversing the District Court's determination of a violation of U.S. copyright law.

LIKELIHOOD OF SUCCESS: DUE PROCESS

The District Court's order was not simply incorrect. Insofar as that order purports to bind the appellants, it was a violation of due process. Appellants were not legally served with the Complaint. Appellants argued that the facts in the Complaint were wrong. They were given no opportunity to contest the facts that form the basis for the injunction.

It is an "elementary" rule of civil procedure and due process that a court cannot adjudicate a claim of a person who was not a party of record, or enter a judgment against someone who "has not been made a party by service of process." Zenith Radio Corporation v. Hazeltine Research, 395 U.S. 100, 110 (1969) (citing Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940); Pennoyer v. Neff, 95 U.S. 714 (1878)); Project BASIC v. Kemp, 947 F.2d 11, 19 (1st Cir. 1991)("...non-parties are generally not bound by court orders because they have not had their day in court; in other words they have not had their opportunity to challenge the order's validity," citing G. & C. Merriam v. Webster, 639 F.2d 29 (1st Cir. 1980))

See Alemite Manufacturing v. Staff, 42 F.2d 832, 833 (2nd Cir. 1930)(Learned Hand) ("[N]o court can make a decree which will bind any one but a party.").

Appellants appeared and argued that the Court did not have personal jurisdiction over them. No evidence was presented that the Court had personal jurisdiction over the appellants. In re Estate of Ferdinand Marcos, 94 F.3d 539 (9th Cir. 1996)(must have personal jurisdiction). See Wright, Miller, and Kane, Federal Practice and Procedure, §2956.

Plaintiffs submitted an affidavit by counsel asserting that appellants were "in privity" with defendants and therefore "in active concert." Schwartz affidavit, ¶3. The sole basis for this argument was that appellants "copied the content [of defendants' speech] directly from [defendants'] Web page or from someone else who did so" allegedly "for the avowed purpose of seeking to avoid" the TRO in this case. Id. Even if these facts are assumed to be true, they do not establish any connection between defendants and appellants that would constitute "privity" or would justify binding appellants under Rule 65(d).

The District Court essentially believed these points to be irrelevant. It held it would determine whether appellants were "in active concert" in a subsequent contempt proceeding. Injunction at p. 2; Order, April 11, 2000. There are four problems with this manner of resolving the applicability of the injunction to appellants.

First, the order restrains speech. There can be no doubt that the speech, even if legal, will be chilled until the Court clarifies whether it is covered or not. Indeed, many of the mirror sites, including appellants, have removed their speech to avoid possible liability. Exhibit F.

Second, under the procedures outlined by the Court, appellants will never have the opportunity to contest the facts or the legal conclusions on which the injunction is based. See

NBA Properties v. Gold, 895 F.2d 30, 34 (1st Cir. 1990)("a court may ordinarily impose [contempt] without providing the party an opportunity to challenge the validity of the decree itself..."); G & C. Merriam v. Webster, 639 F.2d 29 (1st Cir. 1980).

Third, due process requires that appellants be able to determine, without risking contempt, if the order applies to them. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15 (1945)("[W]e think courts would not be apt to withhold a clarification in the light of a concrete situation that left parties or 'successors and assigns' in the dark as to their duty toward the court."); Matter of Hendrix, 986 F.2d 195 (7th Cir. 1993). Despite the Supreme Court's confidence, the District Court did precisely that in this case, twice, by characterizing appellants' concerns as requiring an "advisory" opinion.

Finally, Fed. R. Civ. Pro. 65(d) provides that all injunctions must be "specific in terms." Once appellants asked for the Court's guidance on whether they were bound by the order, the Court's refusal to give any guidance on that matter violated Rule 65(d). See NBA Properties v. Gold, 895 F.2d at 32, 34.

PUBLIC INTEREST

All speech has value, and appellants should not have to justify to this, or any, Court the content of their chosen expression. Silencing speech of any kind -- particularly speech that carries forward a public debate over social and political issues of the day -- is a serious public detriment. But even supposing it were necessary to explain and justify the value of the particular speech appellants seek to engage in, that would be easy. The appellants' speech has obvious value in enabling owners of the product, prospective owners, and those concerned with the issues raised by the product to engage in a more accurate debate about the merits of it. Owners can

determine if the product is so imperfect that they do not wish to use it, or not. Public debate about an important public issue is advanced by the disclosure of the Cyber Patrol blocked site list.

The value of products such as Cyber Patrol has been a matter of significant public debate for years. The Supreme Court referred to such products as a useful alternative to criminal laws in Reno v. ACLU, 521 U.S. 844 (1997). In other contexts, however — for example, in public libraries — the use of such products has been found unconstitutional. Mainstream Loudoun v. Board of Trustees, 2 F. Supp. 2d 783 (E.D. Va. 1998); 24 F. Supp. 2d 552 (1998). There was a recent public vote in Holland, Michigan about the wisdom of installing such products in the public libraries. (The community voted against the product. "Library Net filter proposal defeated," USAToday, Feb. 23, 2000; Keith Bradsher, "Town Rejects Bid to Curb Library's Internet Access," New York Times, Feb 23, 2000, at A12.) Legislation has been introduced in Congress and in the states requiring the use of such products in libraries and schools.

There have been numerous articles in the press about products such as Cyber Patrol. Many have been favorable, explaining their value for parents. Others have been harshly critical, arguing that such products inevitably heavily overblock and underblock. The manufacturers of blocking products generally admit that the products often block sites that no one believes meet the criteria for blocking and they often fail to block sites that do meet the criteria. The program in Loudoun, for example, blocked the site of the American Association of University Women, Maryland chapter. It also blocked a map of Disney World.

The defendants' code, mirrored by appellants, allows lawful owners of the product to view the blocked sites list. In so doing, it contributes important information to this public debate.

Moreover, neither defendants nor appellants obtain any financial advantage or remuneration for their speech.

For these reasons, appellants respectfully ask that a stay be granted.

Respectfully submitted,

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