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Slip Opinion in the Matter of: United States v. Baltimore - A Prosecution under the DMCA

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(Slip Opinion)

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF CALIFORNIA

UNITED STATES V. BALTIMORE*

A PROSECUTION UNDER THE DMCA

I. INTRODUCTION

This action arises out of a program created by a Calculating Institute of Technology ("Caltech") student which disables technology used to protect copyrighted digital media. The Government filed charges against Caltech, Caltech student John Johnson, Caltech president Daniel Baltimore, and Caltech professor Sundance Law, alleging violations of the Digital Millennium Copyright Act ("DMCA"). *See* 17 U.S.C. § 1204.[1]

Currently before the Court is Defendants' motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B). For the reasons set forth below, this Court GRANTS Defendants' motion as to Defendant Caltech, but DENIES the motion as to all other Defendants.

II. FACTUAL BACKGROUND

Caltech is a private university at which Defendant Sundance Law is a professor. In the fall of 2003, Defendant Law divided his Caltech students into teams of two for an encryption/decryption exercise. Within each team, he assigned one student the task of designing a technological protection

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1. Section 1204 states, in pertinent part, that "[a]ny person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain" shall be subject to fines, imprisonment, or both. However, this "shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity."

measure, such as a digital content encryption program, and assigned the other to decrypt the first student's creation. Students posted their encryption and decryption programs on a publicly accessible course website for comment and testing by other students. One student developed an anti-copying system that employed two encryption methods: content encryption and copy control information. Together, these methods created a process called Digital Rights Management ("DRM") that limits and manages the rights associated with using the underlying media content.

Defendant John Johnson, the second student in this dyad, was assigned the task of defeating this program. Johnson's decryption program circumvented both encryption measures, rendering the underlying content completely accessible for copying, distribution, and playback. Johnson's program employed repetitive trial and error techniques (known colloquially as "brute force") to discover the keys needed to bypass the anti-copying system. This technique required significant computing power, which Johnson's program accessed by linking together a web of computers over the Internet. Johnson uploaded his program to the class website and sent Caltech students a request for them to cooperate by linking their computers together. Using this method, Johnson defeated the encryption program within twenty-four hours. Johnson then posted the decryption key and his resumé on the class website.

Professor Law realized that the encryption program Johnson defeated was similar to the 5C Digital Transmission Content Protection ("DTCP") technology that some entertainment and consumer electronics companies use to protect commercially distributed audio and video entertainment works. Law tested Johnson's decryption program on DTCP technology by posting a few seconds of a DTCP-encrypted video clip on Johnson's website. The program found the decryption key within a day. Law posted additional video clips on the website and each was successfully decrypted. Since that time, many others throughout the country have accessed this public website and used Johnson's program to obtain decryption keys to circumvent the technology protecting digital media.

The United States Department of Justice brought criminal charges against Johnson, Law, Caltech, and its president, Daniel Baltimore, for violations of the DMCA. The Government alleged that each Defendant, acting willfully and for purposes of commercial advantage or private financial gain, violated the DMCA's circumvention and anti-trafficking measures. Caltech, Baltimore, and Law were also indicted for aiding and abetting Johnson.

Defendants move to dismiss the indictment on several grounds. First, all Defendants have moved to dismiss the indictment because the DTCP

technology does not "effectively protect" digital content, and thus, does not fall within the meaning of the DMCA. Second, the Defendants also argue that the DMCA unconstitutionally restricts their speech violating their First Amendment rights. Third, Caltech, Baltimore, and Law claim they are neither directly nor vicariously liable for Johnson's conduct. Finally, Caltech claims statutory immunity as an educational institution. The Court rejects all of the Defendants' arguments except for Caltech's claim of statutory immunity.

III. DISCUSSION

Federal Rule of Criminal Procedure 12(b)(3)(B) permits defendants to move for dismissal of an indictment on the grounds that it "fails to invoke the court's jurisdiction or to state an offense." A motion to dismiss the indictment must be tested by its sufficiency to charge an offense. *United States v. Sampson*, 371 U.S. 75, 78–79 (1962). The indictment is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). A motion to dismiss is "'capable of determination' before trial if it involves questions of law rather than fact." *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). But the court may determine factual issues that do not "determin[e] the validity of the defense." *Id.*

A. Caltech Is an Educational Institution, Exempt from Prosecution

Subsection 1204(a) of the DMCA criminal statute states that it "shall not apply to a[n] . . . educational institution." The parties do not dispute that Caltech is an educational institution. However, the Government contends that when Caltech allegedly violated the DMCA, it did not act as an educational institution, and thus, waived its statutory immunity. This interpretation converts Congress' grant of immunity into mere surplusage because the grant could never shield an educational institution from prosecution. Because "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute," this Court must assume that Congress meant what it plainly said. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Therefore, Caltech is exempt from this criminal statute and the motion to dismiss as to Defendant Caltech is GRANTED.

B. The DTCP Technology Is Effective Within the Meaning of the DMCA

The DMCA only prohibits circumventing "effective" technology—

technology that "effectively controls access to a [copyrightable] work."[2] The statutory definition indicates that a technological measure does not need to make circumvention impossible to be effective. If that measure, "in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work," then it is effective. 17 U.S.C. § 1201(a)(3)(B). The statute does not specify the quantity or quality of information, processes, or treatments required to be effective. Thus, even the application of minimal technological measures may be considered "effective" under the statute.

But the encryption technology circumvented here requires much more than the application of minimal technological measures. In order to circumvent this technology, a person would need: (1) the technical knowledge and skill to access and use a distributed computing system; (2) the patience to repeatedly subject two minute clips of video to the decryption system and wait almost a day to obtain each key;[3] and (3) the additional technical ability to splice these clips back together to form the full work. The DTCP encryption prevents access to all except a few skilled people that would have to work for weeks to decrypt a single motion picture on DVD. This effort meets the statutory requirement that, in the ordinary course of its operation, the work cannot be accessed without applying some information, process, or treatment supplied by the copyright owner.

The Defendants urge the Court to adopt a more narrow reading of the word "effective." They argue that effective measures must, at minimum, operate reasonably to control access to copyrightable material. However, even if the Court adopted this more narrow reading, DTCP would still be effective. Because unreasonable and extraordinary efforts are required to bypass the protection system, DTCP technology is therefore "effective" within the meaning of the DMCA.

C. The Indictment Sufficiently Alleges that Defendants Acted Willfully and for Purposes of Commercial Advantage or Private Financial Gain

Defendants argue they lacked the requisite state of mind for criminal sanctions. Section 1204 limits criminal liability to those persons that

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2. 17 U.S.C. § 1201(a)–(b) (2000).

3. Commercial users of 5C DTCP encryption generally divide the underlying digital content into short segments, each requiring a different decryption key. To fully decrypt a work such as a movie, an individual would have to discover keys for each segment and then edit the decoded segments together.

"violate[] section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain." At this pre-trial stage of the proceedings, the Government need only demonstrate that it sufficiently charged the offense. *Sampson*, 371 U.S. at 78–79. The offenses are sufficiently charged if the Government alleges each of "the elements of the offense charged [in a manner that] fairly informs [each] defendant of the charge against which he must defend." *Hamling*, 418 U.S. at 117. Thus, in this case, the Government is required to sufficiently charge that Defendants' conduct was (1) willful and (2) for the purposes of commerical advantage or private financial gain.

1. The Government has sufficiently charged that Defendants' conduct was willful

The Copyright Act does not define willfulness. The Supreme Court has recognized that willful is "a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). To establish willfulness in this context, the Government must allege (1) that each Defendant knew Johnson's program could decrypt media protected by DTCP technology in violation of the DMCA; (2) that each Defendant knew the program was posted on a public website; and (3) that each Defendant could have removed the program after learning the information above but failed to do so.[4] The Government sufficiently states these allegations. It alleges that the Department of Justice notified all Defendants that the program posted on Caltech's public website was capable of circumventing DTCP technology, and that the Defendants refused to remove the program although each was capable of doing so. Therefore, willfulness was alleged sufficiently as to all Defendants.

4. *See United States v. Wise*, 550 F.2d 1180, 1194–95 (9th Cir. 1977) (holding that the defendant acted willfully by continuing to distribute infringing copies of motion pictures after film studios sued him for such conduct); *see also Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1127 (C.D. Cal. 2001) (holding, in denying a motion to dismiss, that plaintiff had sufficiently plead criminal willfulness by alleging that the defendant Cybernet was "aware that the copying [by its affiliated websites was] copyright infringement," that Cybernet knew what its affiliates were doing, and "that Cybernet ha[d] actual notice that Perfect 10 did not give these websites permission to use Perfect 10's images"); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.14 (2004) (stating that § 1204 requires "the traditional two elements to render copyright depredations criminal: acting 'willfully and for purposes of commercial advantage or private financial gain.'").

2. The Government has sufficiently charged that Defendants acted for commerical advantage or private financial gain

The Government must also allege defendants acted for commercial advantage or private financial gain. 17 U.S.C. § 1204. The Copyright Act's definition of financial gain "includes receipt, or expectation of receipt, of anything of value," including future revenue. 17 U.S.C. § 101; *see also A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (extending the concept of financial gain to include the ability to monetize Napster's Internet user-base at some future point).

The indictment states that Defendants maintained the decryption program for commerical advantage or private financial gain. Specifically, the indictment alleges that Defendant Johnson posted his resumé alongside his decryption program on the website, suggesting Johnson hoped to gain employment from posting the program. As to the other Defendants, the Government alleges that maintaining the decryption program on the website has the potential to bring prestige to Professor Law, Caltech, and thus, President Baltimore, from which all could profit. These facts are sufficient to allege that Defendants Law and Baltimore acted for purposes of private financial gain.

D. Law and Baltimore's Third-Party Liability

The federal aiding and abetting statute, 18 U.S.C. § 2(a), states that anyone who "aids, abets, counsels, commands, induces or procures" a federal crime "is punishable as a principal." The statute is "applicable to all federal criminal offenses," and thus, is applicable to the DMCA's criminal statute, 17 U.S.C. § 1204. *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994). "The statute decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Id.*

The Supreme Court has defined criminal aiding and abetting liability as requiring "proof that the Defendant 'in some sort associated himself with the venture, that he participated in it as in something that he wished to bring about, that he sought by his action to make it succeed.'" *Id.* at 190 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). Thus, the Government's indictment of Law and Baltimore must allege that the two knowingly associated themselves with Johnson's alleged venture to violate the DMCA and acted to help the venture succeed. The indictment sufficiently alleges these elements, stating that Law and Baltimore "willfully participated in creating and maintaining a computer program to [violate the DMCA] for commercial advantage and financial gain."

Prosecution's Opposition Brief at 11. This allegation is sufficient to withstand the motion to dismiss as it contains all of the elements of the offense and fairly informs the Defendants of the charge against which they must defend. *See Hamling*, 418 U.S. at 117.

E. The DMCA Does Not Violate the First Amendment

Finally, Defendants claim that the DMCA is a content-based restriction on speech that violates the First Amendment rights of educators and is therefore unconstitutional. Two other district courts in this circuit have heard similar arguments and determined that the DMCA is a content-neutral regulation that does not "burden substantially more speech than is necessary to achieve the government's asserted goals of promoting electronic commerce, protecting copyrights, and preventing electronic piracy." *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002); *accord 321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1101 (N.D. Cal. 2004) ("[T]his Court finds that the challenged provisions further important and substantial government interests unrelated to the suppression of free expression, and that the incidental restrictions on First Amendment freedoms are no greater than essential to the furtherance of those interests.").

The only new wrinkle added to the Defendants' motion to dismiss is their claim that the Government violated the First Amendment by offering to drop criminal charges if Caltech: (1) removed the decryption program from its website, and (2) stopped teaching decryption. The Defendants maintain that the Government's attempt to restrict Caltech's curriculum is clearly unconstitutional. While their argument has merit, it is nonetheless irrelevant to the indictment. Whether the Government's offer was a request, a negotiation, or an order, their indictment was careful not to allege that Caltech's subsequent refusal to stop teaching decryption was an element of the violation of §§ 1201 or 1204. Since the indictment completely relies on the act of knowingly maintaining the decryption program on Caltech's website, the First Amendment was not violated.

Further, Congress tailored the DMCA more narrowly for educational institutions and endeavors than for software distributors such as 321 Studios or Elcom Ltd. The DMCA includes several provisions that provide exemptions for educational purposes. The criminal statute, § 1204(b), exempts all educational institutions for violations of §§ 1201 or 1202. Under certain conditions, § 1201 exempts educational institutions and persons working in encryption research. In fact, Johnson, Law, and Baltimore may have qualified for the encryption research exemption had

they "made a good faith effort to obtain authorization before the circumvention." 17 U.S.C. § 1201(g)(2)(C). These statutory provisions show that, as to educational purposes, Congress tailored the DMCA more narrowly, decreasing burdens on academic freedom.

Therefore, in this academic setting, enforcement of the DMCA did not violate Defendants' First Amendment rights were not violated.

IV. CONCLUSION

A court cannot grant a motion to dismiss criminal charges unless the indictment fails to invoke the court's jurisdiction or fails to allege the elements of the offense. As to Caltech, an educational institution, the DMCA plainly exempts it from prosecution and its motion is GRANTED. However, the Government's indictments of Johnson, Law, and Baltimore contain each of the elements required to state an offense. The Court, therefore, DENIES Defendants Johnson, Law, and Baltimore's motions to dismiss.

Ronald S.W. Lew

United States District Judge

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