

1 KILPATRICK TOWNSEND & STOCKTON LLP
 JAMES G. GILLILAND, JR. (State Bar No. 107988)
 2 TIMOTHY R. CAHN (State Bar No. 162136)
 MEHRNAZ BOROUMAND SMITH (State Bar No. 197271)
 3 HOLLY GAUDREAU (State Bar No. 209114)
 RYAN BRICKER (State Bar No. 269100)
 4 Two Embarcadero Center Eighth Floor
 San Francisco, CA 94111
 5 Telephone: (415) 576-0200
 Facsimile: (415) 576-0300
 6 Email: jgilliland@kilpatricktownsend.com
 tcahn@kilpatricktownsend.com
 7 mboroumand@kilpatricktownsend.com
 hgaudreau@kilpatricktownsend.com
 8 rbricker@kilpatricktownsend.com

9 Attorneys for Plaintiff
 SONY COMPUTER ENTERTAINMENT AMERICA LLC

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

SONY COMPUTER ENTERTAINMENT
 AMERICA LLC, a Delaware limited
 liability company,

Plaintiff,

v.

GEORGE HOTZ; HECTOR MARTIN
 CANTERO; SVEN PETER; and DOES
 1 through 100,

Defendants.

CASE NO. 11-cv-00167 SI

**PLAINTIFF'S OPPOSITION TO
 DEFENDANT'S MOTION RE: TRO**

Date: February 10, 2011
 Time: 10:00 a.m.
 Courtroom: 10, 19th Floor
 Judge: Hon. Susan Illston



TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION 1

II. SCEA’S IRREPARABLE HARM IS ONGOING, AND IF HOTZ IS RELEASED FROM THE TRO, WILL CONTINUE. 2

III. THE TRO IS NOT VAGUE OR OVERBROAD BUT IS APPROPRIATELY TAILORED TO ADDRESS HOTZ’S VIOLATIONS AND SCEA’S HARM 3

 A. The Injunction Does Not Prohibit Hotz From Engaging In Other Activity Unrelated to SCEA’s Claims 3

 B. The Injunction Is Not Impossible To Perform 4

 C. Hotz Should Be Retrained From Publishing Information That He Has Obtained As A Result of His Illegal Activities 4

IV. THE IMPOUNDMENT ORDER IS AUTHORIZED BY THE DMCA AND TAILORED TO STOP HOTZ’S VIOLATIONS AND ADDRESS SCEA’S HARM. 7

V. CONCLUSION 9



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

321 Studios v. Metro Goldwyn Mayer Studios, Inc.,
307 F.Supp.2d 1085 (N.D.Ca. 2004).....5

A & M Records v. Napster, Inc.,
284 F.3d 1091 (9th Cir. 2002)3

E. & J. Gallo Winery v. Gallo Cattle Co.,
967 F.2d 1280 (9th Cir. 1992)3

United States v. Elcom Ltd.,
203 F.Supp.2d 1111 (N.D.Cal. 2002).....5

Universal City Studios, Inc. v. Corley,
273 F.3d 429 (2nd Cir. 2001) 3, 5, 6

Universal City Studios, Inc. v. Reimerdes,
111 F.Supp.2d 294 (S.D.N.Y. 2000) 2, 3, 5, 6

STATUTES

17 U.S.C. §1203(a).....2

17 U.S.C. §1203(b)(2)7

Fed. R. Civ. P. 65(d)(1)(C).....3

OTHER AUTHORITIES

U.S. Const., Amend I..... 1, 4



1 **I. INTRODUCTION**

2 Defendant George Hotz (“Hotz”) does not dispute liability. He limits his Motion for
3 Hearing on Temporary Restraining Order (“Motion”) to arguments about the purported
4 overbreadth and vagueness of this Court’s TRO and impoundment order (the “Order”)
5 entered on January 27, 2011 . Hotz contends that the Order is overbroad because it
6 prohibits him from hacking other companies’ secure systems and because it requires him
7 to do the “impossible”: retrieve information distributed through the Internet. The Order
8 does neither. He further argues that he should remain free to continue his campaign of
9 “unauthorized access” to the PlayStation®3 computer entertainment system (“PS3
10 System”) and to publish information gained thereby, despite his having unlawfully
11 circumvented the Technological Protection Mechanisms (“TPM”) in the PS3 System and
12 having trafficked in circumvention technologies – charges he does not, and cannot,
13 refute.

14 Hotz argues, but fails to establish, that the impoundment provisions of the Order
15 violate the law – indeed, the DMCA statute expressly authorizes it – or to show that
16 impoundment creates any demonstrated hardship to him. Any minor hardship that Mr.
17 Hotz may incur pales in comparison to the irreparable harm to SCEA that will result if he
18 continues to have access to the technologies that circumvent the security measures of
19 the PS3 System. Finally, Mr. Hotz’s contentions concerning First Amendment limits on
20 the TRO are easily dismissed. Numerous courts, including this Court, have rebuffed
21 similar attacks on the remedies provided by the DMCA.

22 The Court’s Order is appropriately worded and should remain unaltered to prevent
23 further irreparable harm to SCEA from Hotz’s distribution of circumvention technologies
24 and information enabling others to circumvent the TPMs of the PS3 System. Indeed,
25 SCEA recently obtained information that Hotz already has violated the TRO by
26 surreptitiously posting online a link to a site containing the MTLDR Keys despite this
27 Court’s express order that he cease such conduct.

28



1 **II. SCEA'S IRREPARABLE HARM IS ONGOING, AND IF HOTZ IS RELEASED**
2 **FROM THE TRO, WILL CONTINUE.**

3 For all the reasons stated in SCEA's opening papers, SCEA is irreparably harmed
4 by Hotz's continued ability to circumvent the PS3 System. SCEA is the exclusive
5 distributor of the PS3 System in the United States and has been irreparably harmed by
6 Hotz's conduct. 17 U.S.C. §1203(a) states that "[a]ny person injured by a violation of [the
7 DMCA anti-circumvention provisions] may bring a civil action in an appropriate United
8 States district court for such violation." SCEA has repeatedly put forth evidence of the
9 significant harm to SCEA that Hotz's activities have caused. See, e.g., Declaration of
10 Ryan Bricker In Support of *Ex Parte* Motion for Temporary Restraining Order and Order
11 To Show Cause Re Preliminary Injunction, (Docket No. 42), ¶2, Exh. A. Hotz cynically
12 argues that, because some harm has been accomplished already, it should be allowed to
13 continue unchecked. Hotz fails to recognize that, if Hotz is permitted to continue using
14 and distributing his Circumvention Devices, SCEA's efforts to limit further harm will be
15 significantly frustrated. Indeed, beginning only a few days after Hotz published his
16 Circumvention Devices, technology news outlets have published and continue to publish
17 stories of gamers using their "jailbroken" PS3 Systems to cheat in online video game
18 forums, threaten the fairness and integrity of online game play, and ruin the communal
19 gaming experience for legitimate gamers. Declaration of Holly Gaudreau In Support of
20 Plaintiff's Opposition to Defendant's Motion Re: TRO ("Gaudreau Decl."), ¶4, Exhs. C.
21 This damages SCEA's reputation and goodwill, and harms its relationships with video
22 game developers and customers.

23 Confronting a similar situation in which a circumvention device had already been
24 distributed, and the plaintiff sought to prevent the defendants' further distribution and
25 resulting harm, the court explained that the defendants "would harm plaintiffs every day
26 on which they post [the circumvention device] on their heavily trafficked web site."
27 *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294, 344 (S.D.N.Y. 2000). The
28 court emphasized that the defendants should not be allowed to continue to inflict



1 “immediate and irreparable injury” on the plaintiffs simply because others might do so as
2 well. *Id.* Finding that modern technology’s ability to swiftly disperse information has not
3 “withered the strong right arm of equity,” the court expressed confidence in the likelihood
4 “that [its] decision will serve notice on others that ‘the strong right arm of equity’ may be
5 brought to bear against them absent a change in their conduct and thus contribute to a
6 climate of appropriate respect for intellectual property rights in an age in which the
7 excitement of ready access to untold quantities of information has blurred in some minds
8 the fact that taking what is not yours and not freely offered to you is stealing.” *Id.* at 344-
9 45 (quoted in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 442 (2nd Cir. 2001)).

10
11 **III. THE TRO IS NOT VAGUE OR OVERBROAD BUT IS APPROPRIATELY**
12 **TAILORED TO ADDRESS HOTZ’S VIOLATIONS AND SCEA’S HARM**

13 The TRO entered by this Court is clear, narrowly tailored to address Hotz’s wrongs
14 and SCEA’s harm, and “describe[s] in reasonable detail. . .the act or acts restrained or
15 required.” Fed. R. Civ. P. 65(d)(1)(C). Under Ninth Circuit law, courts must “not set
16 aside injunctions under this rule “unless they are so vague that they have no reasonably
17 specific meaning.” *A & M Records v. Napster, Inc.*, 284 F.3d 1091, 1097 (9th Cir. 2002),
18 *quoting E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992).
19 As set forth below, the TRO is not vague or overbroad, nor has Hotz offered any credible
20 reason why he cannot and should not comply with its terms.

21 **A. The Injunction Does Not Prohibit Hotz From Engaging In Other**
22 **Activity Unrelated to SCEA’s Claims**

23 Hotz complains that the injunction improperly prohibits him from engaging in
24 “legal” circumvention activities involving other systems. It does not. Hotz is deliberately
25 creating ambiguities where none exist. The injunction is currently limited to SCEA’s PS3
26 System. Therefore, Paragraph 1 of the TRO, which defines “circumvention devices” by
27 referring to “other copyrighted works,” obviously is meant to refer to those works that are
28 accessible through and compatible with the PS3 System, such as the copyrighted video



1 game software playable on the PS3 System. To clarify this point even further, SCEA has
2 offered to Mr. Hotz's counsel that it will modify the last sentence of Paragraph 1 to read:
3 "and other copyrighted works that are accessible through and compatible with the PS3
4 System." Counsel for Mr. Hotz, however, has not yet responded to SCEA's offer.
5 Gaudreau Decl., ¶5.
6

7 **B. The Injunction Is Not Impossible To Perform**

8 Hotz claims that the injunction is impossible to perform because it requires him to
9 "retrieve the Internet." Not so. The injunction simply requires Hotz to take down the
10 circumvention devices or any information relating thereto that *he* has "previously
11 delivered or communicated to" the other defendants or any third parties. See TRO at 3.
12 Hotz can identify all the parties to whom he trafficked this information and issue a joint
13 demand with SCEA for its retrieval. He is required only to retrieve the circumvention
14 devices and illicit information from those he knows have it.
15

16 **C. Hotz Should Be Retrained From Publishing Information That He Has
17 Obtained As A Result of His Illegal Activities**

18 Hotz asserts that the injunction is overbroad because he is restrained from
19 publishing information relating to his circumvention activity and unauthorized access to
20 the PS3 System or PlayStation Network ("PSN"), even if that information is not otherwise
21 protected by copyright. To the contrary, enjoining Hotz from the publication of
22 information obtained through his illegal hacking of the PS3 System is a reasonable and
23 necessary restriction designed to: (1) prevent Hotz from taking further advantage of his
24 unlawful circumvention; and (2) protect SCEA from further harm stemming from the
25 distribution of information obtained through Hotz's hacks. Indeed, Hotz would have
26 never obtained this information but for his illegal conduct. He should not be allowed to
27 make an end run around the purpose and effect of the injunction by publishing the fruits
28 of his illegal activity.

Hotz's argument that this restriction violates the First Amendment runs contrary to



1 established DMCA law. Because information and material obtained by Hotz through his
2 circumvention – including the Metldr Keys – constitutes a circumvention device or part
3 thereof, the restriction against his distribution is rooted in the anti-trafficking provisions in
4 the DMCA. His argument is unpersuasive for the same reasons that analogous
5 arguments failed in previous DMCA cases, including *321 Studios v. Metro Goldwyn*
6 *Mayer Studios, Inc.*, 307 F.Supp.2d 1085 (N.D.Cal. 2004); *United States v. Elcom Ltd.*,
7 203 F.Supp.2d 1111 (N.D.Cal. 2002); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429
8 (2nd Cir. 2001); and *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294
9 (S.D.N.Y. 2000). The holdings in those cases make clear that, because the activity
10 restricted by the DMCA's anti-trafficking provisions includes both speech and non-speech
11 aspects, and because the anti-trafficking provisions target only the non-speech aspect of
12 the prohibited activity, the restrictions against distributing circumvention devices –
13 including linking to websites where the devices can be found or offering instructions for
14 locating a circumvention device – are content-neutral, justified, and not overbroad. See
15 *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.Supp.2d 1085, 1100-01 (N.D.
16 Cal. 2004). Confronting a similar argument in *321 Studios*, this Court quoted the Second
17 Circuit's *Corley* opinion, explaining:

18 This type of regulation is therefore content-neutral, just as would be a
19 restriction on trafficking in skeleton keys identified because of their
20 capacity to unlock jail cells, even though some of the keys happened to
21 bear a slogan or other legend that qualified as a speech component. *321*
22 *Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.Supp.2d 1085, 1100
(N.D. Cal. 2004) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d
429, 454 (2nd Cir. 2001)).

23 Similar to the DeCSS keys at the center of the *321 Studios* case and the skeleton
24 keys in the analogy above, there is a distinctly functional, non-speech aspect to Hotz's
25 distribution of material and information that he obtained by circumventing the PS3
26 System. The material and information that Hotz has gathered as a result of his
27 circumvention enables others to bypass or disable certain technological protection
28 measures in the PS3 System. Accordingly, it essentially "has the capacity to unlock jail



1 cells." *Compare with Universal City Studios, Inc.*, 111 F.Supp.2d at 328-29 ("The
2 computer code at issue in this case, however, does more . . . than convey a message. . .
3 . [I]t has a distinctly functional, non-speech aspect in addition to reflecting the thoughts of
4 the programmers. It enables anyone who receives it and who has a modicum of
5 computer skills to circumvent plaintiffs' access control system.").

6 The language in the immediate injunction prevents Hotz from disseminating the
7 material and information that "has the capacity to unlock jail cells," so to speak. Like the
8 relief at issue in *Reimerdes* and *Corley*, the immediate injunction "is focused squarely
9 upon the effect of the distribution of the functional capability that the code provides."
10 *Universal City Studios, Inc.*, 111 F.Supp.2d at 329. Indeed, SCEA only seeks to
11 preclude Hotz from posting, linking to, or discussing the proprietary material and
12 information that Hotz illegally gathered during his circumvention activities; the restriction
13 is reasonable because Hotz has repeatedly distributed portions of that materials and
14 information in an effort to aid others' circumvention efforts, and ultimately to facilitate
15 copyright infringement. In fact, the restriction is particularly critical because Hotz has
16 continued linking to the Metldr Keys even after this Court issued a Temporary Restraining
17 Order against that very activity. Gaudreau Decl., ¶¶2-3, Exhs. A and B.¹

18 Because the language of the immediate injunction targets the non-speech aspect
19 of his defendant's activity, and because Hotz has shown that he will continue to distribute
20 this material in defiance of this Court's direction, the injunction barring Hotz from
21 "distributing any information . . . or other material obtained by circumvention" is neither
22 overbroad nor does it burden more speech than is necessary or permissible.²

23 _____
24 ¹ Confronting similar circumstances where the defendants continued to link to websites
25 distributing the subject circumvention device following the issuance of a preliminary
26 injunction, the district court in *Reimerdes* explained that the "defendants obviously hoped
27 to frustrate plaintiffs' recourse to the judicial system by making effective relief difficult or
28 impossible." *Universal City Studios, Inc.*, 111 F.Supp.2d at 313.

² The district court in *Reimerdes* further explained: "Any impact on the dissemination of
[defendant's] ideas is purely incidental to the overriding concerns of promoting the
distribution of copyrighted works in digital form while at the same time protecting those
works from piracy and other violations of the exclusive rights of copyright holders."
Universal City Studios, Inc., 111 F.Supp.2d at 329.



1 **IV. THE IMPOUNDMENT ORDER IS AUTHORIZED BY THE DMCA AND**
2 **TAILORED TO STOP HOTZ'S VIOLATIONS AND ADDRESS SCEA'S HARM.**

3 The DMCA expressly authorizes this Court "at any time while an action is pending,
4 [to] order the impounding, on such terms as it deems reasonable, of any device or
5 product that is in the custody or control of the alleged violator and that the court has
6 reasonable cause to believe was involved in a violation." 17 U.S.C. §1203(b)(2). To
7 permit Mr. Hotz adequate time to prepare for the impoundment, the Court delayed
8 implementation of this portion of the TRO for 10 business days.

9 Hotz has acknowledged that the circumvention and related software is stored on
10 his computers. Moreover, SCEA has shown that Hotz's computer(s), PS3 Systems, and
11 other storage devices have been "involved in a violation" under the DMCA. Specifically,
12 Hotz has used his computer(s) to circumvent TPMs in the PS3 System in order to obtain
13 the "Metldr Keys" which he then distributed through his website. Declaration of Ryan
14 Bricker In Support of *Ex Parte* Motion for Temporary Restraining Order and Order To
15 Show Cause Re Preliminary Injunction, (Docket No. 42), ¶¶23, Exh. V. Additionally,
16 utilizing his computer(s), Hotz wrote code – the 3.55 Firmware Jailbreak, the dePKG
17 Firmware decrypter, and the Signing Tools – that can be used to bypass the TPMs in the
18 PS3 System and distributed these circumvention devices to third parties. *Id.* at ¶¶23 and
19 25, Exhs. V and X. As demonstrated in the video that he posted on YouTube, Hotz also
20 has jailbroken at least one PS3 System using his 3.55 Firmware Jailbreak, thereby
21 turning the machine into a circumvention device. *Id.* at ¶24, Exh. W. To do so, he used a
22 storage device to load the 3.55 Firmware Jailbreak software onto his PS3 System. *Id.*
23 Thus SCEA has clearly established, and Hotz has not rebutted, that he used the devices
24 that are subject to the impoundment order in violation of the DMCA.

25 The impoundment order is necessary to (1) prevent Hotz's further access to these
26 circumvention technologies during the pendency of this action; and (2) prevent further
27 harm to SCEA. The risk of harm to SCEA is clear. For example, Hotz has already
28 admitted to playing unauthorized video games after circumventing the PS3 System,



1 stating that “playing super mario world [*i.e.*, a game not even licensed to be played for the
2 PS3] made all my time investments worth it.” Second Supplemental Declaration of Ryan
3 Bricker In Support of *Ex Parte* Motion for Temporary Restraining Order, (Docket No. 22),
4 ¶5, Exh. D. Hotz likely did so using the jailbroken PS3 System, a subject of the
5 impoundment order. Any use by Hotz of that System constitutes unlawful conduct and
6 there is no good reason for Hotz to hang on to the machine. Nor will Hotz suffer any
7 harm from not having access to the jailbroken PS3 System. In contrast, SCEA will suffer
8 significant harm in that Hotz will be able to continue his efforts to circumvent the TPMs in
9 the PS3 System and continue playing unauthorized or pirated video games.

10 Similarly, Hotz should not have access to the tools he used to circumvent the PS3
11 System – the circumvention software that he admits reside on his computer(s) and on
12 other storage devices. Hotz has already demonstrated through his conduct since the
13 issuance of the injunction that he will not abide by this Court’s order. Indeed, *on the day*
14 *after the Court issued its TRO*, Hotz posted a link on the <www.psx-scene.com> forum to
15 the “Metldr Keys” – one of the subjects of the injunction. Gaudreau Decl., ¶2-3, Exhs. A
16 and B. As Hotz has no qualms about violating this Court’s order, it is important to
17 completely remove the circumvention devices from Hotz’s possession. Similarly, it is
18 important to impound the machines that he has used to create and distribute those
19 devices. Hotz’s desire to maintain this information in his possession is suspect at best
20 and together with his post-injunction conduct leads to the conclusion that he will likely
21 continue his circumvention efforts unless the impoundment order is strictly enforced.

22 Perhaps equally telling is the fact that Hotz, through his counsel, has rejected all
23 offers by SCEA to discuss alternatives to impoundment, stating that he would rather go
24 with an “all or nothing” approach to impoundment. Gaudreau Decl., ¶5. In a further
25 attempt to alleviate any concerns of Hotz’s counsel, SCEA’s counsel sent an email to him
26 offering to move the location of impoundment closer to his client’s residence and to allow
27 Mr. Hotz to create copies of files that he needed in order to perform his employment
28



1 duties. *Id.* at ¶5. Hotz's counsel, however, has not yet responded to SCEA's offer. *Id.*
2 Hotz's unwillingness to consider or propose a compromise on this issue shows that he is
3 not truly concerned about either his employment opportunities or any discrete privacy
4 issue – rather he simply wants to maintain possession of the circumvention devices and
5 the tools he has used to exploit or distribute them.

6 Indeed, Hotz has demonstrated no unusual hardship to him that will result from the
7 impoundment of these computers and devices, and certainly no hardship that outweighs
8 the potential harm to SCEA if he continues to have access to them. In fact, Hotz has not
9 even submitted a declaration to support his lawyer's assertion that Mr. Hotz's consulting
10 efforts – whatever they may be – will be impacted by not having the computers. And he
11 has had 10 business days to obtain other computers to use for activities not prohibited by
12 the Court's Order. On the other hand, the harm to SCEA if the impoundment order is not
13 upheld is that Hotz will continue his circumvention efforts and threaten further irreparable
14 harm to SCEA's business.

15
16 **V. CONCLUSION**

17 For the reasons set forth above, SCEA respectfully requests that the Court deny
18 Defendant's request that the TRO be modified.

19 Respectfully submitted,

20 DATED: February 9, 2011

KILPATRICK TOWNSEND & STOCKTON LLP

21
22
23 By: /s/ James G. Gilliland, Jr.
JAMES G. GILLILAND, JR.

24 Attorneys for Plaintiff
25 SONY COMPUTER ENTERTAINMENT AMERICA
26 LLC

27
28 63147721 V1

